In The Supreme Court
Of
The United States

The Merrimack River Savings Bank, a corporation, *Appellant,*

vs.

The City of Clay Center, Kansas, a municipal corporation, George W. Hanna, mayor of said city, O. L. Slade, G. P. Randall, W. D. Vincent, L. Brightweser, E. D. Hartwell, and S. D. Tripp, composing the City Council of said City; and The Clay Center Light & Power Company, a corporation, *Appellees.*

No. 604
October Term
1910

Appeal from the Circuit Court for the District of Kansas.

MOTION TO ADVANCE AND SUBMIT FOR HEARING.

Now come the above named appellees, the City of Clay Center, and the mayor and council of said city above named, and move the court to advance the above

entitled case and set the same down for hearing at once and for the submission of such case for the following reasons, to-wit:

Said case is brought to this court on appeal from the circuit court of the United States for the district of Kansas under act of March 3rd, 1891, the same being under section 5 of chapter 517 and the only question involved is the question of the jurisdiction of said circuit court for the district of Kansas, and the only question passed upon by said circuit court, from which this action is appealed, was the question of jurisdiction of said court.

These moving appellees have complied with rule 6 of this court by serving notice of this motion with copy of brief and argument on the counsel for appellant more than three weeks prior to the 17th day of October, 1910, the time fixed in said notice for the hearing of this motion.

These moving appellees further show to the court that proof of service of said notice and service of brief has been filed with the clerk of this court.

A. A. GODARD,
F. B. DAWES, *and*
R. C. MILLER,
Solicitors and Counsel for Appellees.

History of Case and Statement of Facts

On the 22nd day of April, 1886, the defendant, the city of Clay Center, was a city of the second class under and by virtue of the laws of the State of Kansas.

On the 22nd day of April, 1886, the mayor and council of the city of Clay Center passed an ordinance granting to one Alonzo F. Dexter, his successors and assigns, a franchise to use the streets, alleys and public grounds of the city for the purpose of maintaining poles and running wires thereon for the conveyance of electricity to furnish light and power for the use of such city and its inhabitants.

The law under which said franchise was granted was contained in what is commonly known as the second class city charter act, and was section 7 of chapter 99 of the session laws of Kansas of 1885, and is now paragraph 1404 or section 65 of chapter 18 of the general statutes of Kansas of 1909. Said section reads as follows:

"The council may provide for and regulate the lighting of the streets, and the erection of lamp-posts, and the numbering of the buildings in the city, and the construction of sewers; and the council shall have power to make contracts with any person, company or

association for such purposes, and give such person, company or association the privilege of furnishing light for the streets, lanes or alleys of said city for any length of time not exceeding twenty-one years. It may also by ordinance adopt a method of numbering the buildings, and make contracts to secure the same to be done. L. 1872, ch. 100, P. 59, ,as amended by L. 1885, Ch. 99, P. 7, March 11.)"

The above section as above stated was section 7 of chapter 99 of the session laws of Kansas of 1885, and was published in the official state paper *and took effect March* 11, 1885.

Under the powers granted to cities of the second class by said section, the mayor and council of the city of Clay Center, on the 22nd day of April, 1886, passed an ordinance which was and is in the words and figures as follows, to-wit:

ORDINANCE NO. 26.

An Ordinance Providing for Lighting the City of Clay Center, Kansas, by Electricity.

Be it Ordained by the Mayor and Councilmen of the City of Clay Center:

Section 1. That Alonzo F. Dexter, of Clay Center, Kansas, his successors and assigns, are hereby granted the right of way and authorized to use the streets, avenues, alleys and public grounds of this city for the purpose of erecting and maintaining poles and running wires thereon for the conveyance of electricity to furnish light and power for the use of the said city and its inhabitants. Said poles shall be erected on the outside limits of the sidewalks on all streets and ave-

nues and on the sides of the streets, avenue and alleys designated by the city council.

Section 2. The poles mentioned in the preceding section shall be as large, or larger than those ordinarily used for telegraph poles, and the wires shall be insulated and placed high enough above the ground so as not to interfere with public travel on any of the public or private property of said city.

Section 3. That the said Alonzo F. Dexter, his successors and assigns, shall not charge for light furnished any of the inhabitants of this city a sum greater than the equivalent of best coal gas at two dollars per thousand cubic feet, or a sum not greater than one hundred dollars per annum per arc light of two thousand candle light power, or twenty dollars per annum for incandescent light of sixteen candle power.

Section 4. The said Alonzo F. Dexter his successors and assigns, shall establish within the city limits, electric light works of sufficient power at all times to furnish all the light needed for the use of said city and the inhabitants thereof, and shall furnish both arc and incandescent lights at prices not to exceed those named in the 2nd section of this ordinance.

Section 5. The said Alonzo F. Dexter, his successors and assigns shall not charge the city of Clay Center for light furnished to light its streets or public buildings a sum greater than an equivalent of best coal gas at one dollar and seventy-five cents per thousand cubic feet, either for incandescent or arc lights.

Section 6. That Alonzo F. Dexter, his successors and assigns shall furnish arc lights for the use of this

city, of two thousand candle light power at a sum not to exceed one hundred dollars per annum per light, and shall furnish incandescent lights of sixteen candle power for the use of said city for a sum not to exceed twenty dollars per light per annum; provided the city shall take and use not less than five such arc lights or thirty such incandescent lights. The said Alonzo F. Dexter, his successors and assigns, to furnish everything necessary and light and extinguish the lights; said lights to be kept burning all night except nights when the moon gives sufficient light to light the city.

Section 7. That the city of Clay Center reserves the right to grant equal and like privileges to any other person or company during any or all the time covered by this ordinance.

Section 8. That the said Alonzo F. Dexter, his successors and assigns, shall at all times furnish light for the use of this city and the inhabitants thereof at as cheap a rate as electric light is furnished any city or inhabitants thereof in the United States.

Section 9. That the rights and privileges hereby granted are for a term of twenty-one years; provided, the said Alonzo F. Dexter, his sucessors and assigns, shall begin the erection of said electric light works within ninety days from the passage of this ordinance, and shall complete the same and have the same in working order within one year from the passage of this ordinance, and *Provided further, that if at the expiration of twenty-one years the city shall refuse to grant a further continuance of these privileges, the said city shall purchase said works at their appraised value*, the same to be appraised by three disinterested electors of the state

of Kansas, one of whom shall be chosen by the city, one by Alonzo F. Dexter, his successors and assigns, and the two so chosen shall select a third, and the amount agreed upon, upon their oaths, by the three so chosen shall be the price to be paid therefor; and provided further, that the city of Clay Center shall have the right to revoke the privileges herein granted, at any time, if the said Alonzo F. Dexter, his successors and assigns, shall fail to comply with all the provisions of this ordinance.

Section 10. This ordinance shall take effect and be in force from and after its passage, approval and publication in The Dispatch."

On the passage of the above ordinance and within the year specified by the same the said Alonzo F. Dexter constructed an electric light plant and began furnishing light for the city and its inhabitants. Afterward and by various transfers the title to the franchise and plant became the property of the Clay Center Light and Power Company.

The twenty-one years, the life of the franchise, under the terms of the statute above quoted and section 9 of the ordinance herein set out, expired by limitation of time, on the 22nd day of April, 1907.

At the expiration of the twenty-one years from the passage of the ordinance the Clay Center Light and power Company was in the possession of and was operating the electric light plant. The city did not renew the franchise but notified the Clay Center Light and Power Company to remove its poles and wire from the streets of the city.

On the 29th day of April, 1907, the Clay Center Light and Power Company began an action in the District Court of Clay county, Kansas, praying for the specific enforcement of the contract with the city created by the passage of the above ordinance, the acceptance by Dexter and the sale of the franchise and plant to it. In its petition it set out the ordinance, its acceptance by Dexter, the erection of the plant and its fulfillment of the contract in general. To this the city filed its answer setting up various grounds of defense, which it is not neessary to set up here for the purposes of this motion. On the 24th day of June, 1907, the case was heard by the district court of Clay county. The court rendered judgment in favor of the Clay Center Light and Power Company, holding section 9 of said ordinance to be valid and binding and inasmuch as the city had not extended the franchise that it was bound to purchase the plant under the terms provided in section 9 of said ordinance.

The city took this case on error to the supreme court of the state of Kansas. It was claimed on the part of the city that under the statute above quoted the mayor and council had no power to grant a franchise for a period exceeding twenty-one years and that that portion of section 9 above set out, which attempted to bind the city to either renew the franchise or buy the plant, was beyond the power of the city, and, therefore *ultra vires* and void. The case was argued in the supreme court in May, 1908, and at the June sitting of said court a unanimous opinion of the court was handed

down holding that under the provisions of the laws of the state of Kansas, above set out, the city had no power to grant a franchise for a period exceeding twenty-one years and had no power to bind a future council twenty-one years hence to renew the franchise or to bind the city twenty-one years hence to purchase the plant. And further holding that the provisions of section 9 of the ordinance above set out, which attempted to bind the city to renew the franchise or purchase the plant, were *ultra vires* and void. The opinion so rendered by the supreme court of the state of Kansas together with the statement of facts made by the court were and are in words and figures as follows, to-wit:

The City of Clay Center, Plaintiff in Error,

vs.

The Clay Center Light & Power Company, Defendant in Error.

"Error from District Court, Clay County; Sam Kimble, Judge.

Action by the Clay Center Light & Power Company against the city of Clay Center and others. Judgment for plaintiff, and defendants bring error. Reversed.

This is an action to compel the specific performance of a contract. The contract sought to be enforced consists of an ordinance passed by the city of Clay Center, the provisions of which have been performed

by the defendant in error. The ordinance was enacted April 22, 1886. The provisions thereof which are involved in this controversy read:

"Section 1. *Franchise—Grant of.* That Alonzo F. Dexter, of Clay Center, Kansas, his successors and assigns, are hereby granted the right of way and authorized to use the streets, avenues, alleys and public grounds of this city for the purpose of erecting and mantaining poles and running wires thereon for the conveyance of electricity to furnish light and power for the use of the said city and its inhabitants.

"Section 9. *Term of Franchise.* That the rights and privileges hereby granted are for a term of twenty-one years; provided, that if at the expiration of twenty-one years, the city shall refuse to grant a further continuance of these privileges the said city shall purchase said works at their appraised value, the same to be appraised by three disinterested electors of the state of Kansas, one of whom shall be chosen by the city, one by Alonnzo F. Dexter, his successors and assigns, and the two chosen shall select a third, and the amount agreed upon, upon their oath, by the three so chosen shall be the price to be paid therefor."

The power of the city to enact this ordinance is found in section 1000, Gen. St. 1901, which was in force when the ordinance was passed by the city council. Said statute reads: "Section 1000. The council may provide for and regulate the lighting of the streets, and the erection of lamp-posts, and the numbering of buildings in the city, and the construction of sewers; and the council shall have power to make contracts with any person, company or association for such purposes

and give such person, company, or association the privilege of furnishing light for the streets, lanes or alleys of said city for any length of time not exceeding twenty-one years. * * * " The franchise granted to Dexter was by him assigned, and it is now owned by the defendant in error. At the expiration of the twenty-one years, the city refused to grant any further continuance of the franchise, and also refused to purchase the light plant, but determined to erect a new plant and furnish its own light. The light company then commenced this action in the district court of Clay county to compel the city to purchase the plant as stipulated in the ordinance, and it obtained a decree to that effect. The city prosecutes error. * * *

OPINION.

Graves, J. (after stating the facts as above.)

Many important and interesting questions have been ably and exhaustively discussed by counsel both in the briefs and oral arguments; but we have concluded that the case can be disposed of by the decision of a single question, and will, therefore, consider nothing further. It will be seen that the statute which conferred authority upon which this franchise was granted expressly limits the duration of such grant to twenty-one years. It is needless, therefore, to inquire what power the city might have had with respect to providing electric lights for its streets, lanes, and alleys, and forthe use of its inhabitants, under the general welfare clause of its charter, in the absence of a statute upon that subject; nor what rights it might have had under the general welfare clause and this statute taken to-

gether, if the restrictive clause had been omitted. The limitation against granting such a franchise for a period exceeding twnty-one years amounts to an absolute prohibition which is conclusive upon the city and all other persons. Both the parties to this franchise were bound to take notice of the law under which they acted, and must be held to have contracted with reference thereto The city council, when the ordinance in question was enacted, being without authority to grant the franchise for a period exceeding twenty-one years, was, likewise powerless to impose a valid burden upon the city as a penalty for refusing to do the act which the statute prohibited it from agreeing to do. That which the city was forbidden to do directly it could not accomplish by evasion and indirection. The evident purpose of the limitation placed upon the continuance of franchises of this kind was to give cities at reasonable intervals an opportunity to revise the provisions thereof, and thereby secure by the terms of a new contract such advantages as might result from the growth of the city and the consequent increased demand for light and power or on account of improved appliances for lighting plants or otherwise. The language here used is: 'If at the expiration of twenty-one years, the city shall refuse to grant a further continuance of these privileges, the city shall purchase,' etc. This completely deprives the city of an opportunity to stipulate for any change in the terms or conditions of the contract and enforces a perpetuation of the old franchise, however disadvantageous its provisions might be to the city. In this indirect manner the object of the statute is rendered nugatory. The provisions of statute present a complete bar to the enforcement of this provision of the contract. These propositions are too familiar and elementary to justify the citation of authorities in their support.

The judgment of the district court is reversed, with instructions to enter judgment for costs in favor of the city."

The syllabus in the above case which under the law of the state of Kansas is prepared by the court itself and which contains the law points decided was and is in the following words and figures, to-wit:

"1. *Specific Performance—Contract—Illegal Provision.* A provision in a contract which is contrary to law cannot be enforced in an action for specific performance.

"2. *Municipal Corporation—Electric Light Companies—Duration.* On April 22nd, 1886, the mayor and council of a city of the second class could not, under the authority of section 1000, Gen. St. 1901, bind the city in an ordinance granting a franchise to an electric light company to extend such franchise beyond the period of twenty-one years.

"3. *Same—Purchase of Plant by City.* An ordinance containing a provision compelling the city to purchase the electric light plant at the expiration of twenty-one years in case of refusal to extend the franchise, is contrary to law and void."—(Syllabus by the Court)

The Clay Center Light & Power Company then filed a motion for rehearing in the supreme court of the state of Kansas in which for the first time it sought to inject certain federal questions. The supreme court denied a rehearing in the case and issued its mandate

to the district court of Clay county, Kansas, to enter judgment in favor of the city for costs. In denying the rehearing the court handed down the following opinion, to-wit:

"PER CURIAM.

"'A petition for rehearing has been filed in this case and we have carefully re-examined the questions involved but see no adequate reason for a rehearing.

"In an amendment to the petition for rehearing, it is urgently insisted for the first time that the decision as it stands will deprive the defendant in error of its rights under the constitution of the United States, but it is now too late for the question to be considered.

"The petition is denied."

This case was then taken to this court by writ of error the supreme court of the state of Kansas On motion filed by the City of Clay Center the writ of error was dismissed for want of jurisdiction. The mandate of the supreme court of the state of Kansas commanding the district court of Clay county, Kansas, to render judgment in favor of the city of Clay Center for costs was then spread upon the minutes of the court and judgment rendered in accordance therewith in favor of the city.

Immediately thereafter and on the — day of February, 1909, this action was begun in the circuit court of the United States for the district of Kansas by the Merrimac River Savings Bank. In the original bill after alleging the passage of the ordinance, the accept-

ance by Dexter, the erection of the plant, the ownership of the franchise and plant by the Clay Center Light & Power Company, the bill alleged that in 1899, one William Williamson, who was then the owner of the franchise and plant, executed a mortgage upon the same to one Crippen, Lawrence & Co., for the sum of fifteen thousand dollars for the purpose of securing an obligation of that amount signed by the said Williamson and that said mortgage and bond or obligation had in the due course of business been transferred to it and that it was the owner and holder thereof. It then alleged that the city was about to destroy and remove its poles and wires from its streets and prayed for a perpetual injunction. It alleged that the plaintiff was a citizen of New Hampshire. It made the city of Clay Center and the Clay Center Light & Power Company defendants. Both the defendants were citizens of the state of Kansas. Said original bill of complaint was and is in words and figures as follows, to-wit:

In the Circuit Court of the United States, in and for the District of Kansas, First Division.

IN EQUITY.

The Merrimack River Savings Bank, a Corporation, *Complainant*

vs.

The City of Clay Center, Kansas, a Municipal Corporation; George W. Hanna, Mayor of the said City; O. L. Slade, G. P. Randall, W. D. Vincent, L. Brightweser, E. D. Hartwell, and S. D. Tripp, composing the City Council of said City; and the Clay Center Light & Power Company, a Corporation, *Defendants*

BILL OF COMPLAINT.

To the Honorable Judges of the Circuit Court of the United States for the District of Kansas, First Division:

Your orator, the Merrimack River Savings Bank a corportion organized as a body corporate under the laws of the state of New Hampshire and having its corporate domicile in, and being a citizen of the state of New Hampshire, and having its business and residence at the city of Manchester, in said state, brings this, its bill of complaint, against the city of Clay Center, a municipal corporation, organized under and by virtue of the laws of the state of Kansas, as a city of the second class, being a body corporate and politic having its domicile in the said state of Kansas and

being a citizen and resident of the said state of Kansas; George W. Hanna, mayor of the said city; G. P. Randall, O. L. Slade, W. D. Vincent, L. Brightweser, E. D. Hartwell, and S. D. Tripp, composing the city council of the said city, said mayor and said councilmen being residents and inhabitants of the state of Kansas and residing at Clay Center in said state, and the Clay Center Light & Power Company, a corporation organized under the laws of the state of Kansas, having its domicile and place of residence at the city of Clay Center in said state; the said defendants each and all of them being inhabitants of the said district and the first division thereof. And therefore your orator complains and says:

I.

That the amount involved in this action exclusive of interest and costs exceeds the sum and value of two thousand ($2000.00) dollars.

II.

That on the twenty-second (22) day of April, one thousand eight hundred and eighty-six (1886), the said city of Clay Center, the defendant herein, was, and it now is, a city of second class under the laws of the state of Kansas, and that on said date the city council of the said city passed a certain ordinance which was duly approved by the mayor of said city on the twenty-third (23) day of April, one thousand eight hundred and eighty-six (1886), and was published according to law on the twenty-ninth (29) day of April, one thousand eight hundred and eighty-six (1886), by which said ordinance so enacted, approved and published, the said defendant, the city of Clay Center, entered into a contract with one Alonzo F. Dexter, his successors and assigns, whereby the said city granted

to the said Alonzo F. Dexter, his successors and assigns the right of way to use the streets, avenues, alleys and public grounds of the said city for the purpose of erecting and maintaining posts and line wires thereon for the conveyance of electricity to furnish light and power for the use of the said city and its inhabitants upon the terms and conditions in the said ordinance contained. A full and true copy of the said ordinance entitled: "'An Ordinance Providing for Lighting the City of Clay Center, Kansas, by Electricity," is hereto attached, marked "Exhibit A" and made part of this bill of complaint.

Your orator further alleges and complains that under and by virtue of the provisions of section nine (9) of said ordinance, it was stipulated and agreed that the rights and privileges granted by the said ordinance were to continue for a term of twenty-one (21) years provided the said Alonzo F. Dexter, his successors and assigns should begin the erection of said electric light works within ninety (90) days from the passage of the ordinance, and should complete and have same in working order within one (1) year from the passage of said ordinance; and it was therein further provided in substance that if, at the expiration of said period of twenty-one (21) years, the said city shall refuse to grant a continuance of the privileges in the said ordinance or franchise, to the said Alonzo F. Dexter, his successors or assigns, the said city shall purchase the said electric light works at their appraised value, the same to be appraised by three (3) disinterested electors of the state of Kansas, one of whom should be chosen by the city, one by the owner of the said plant and the two so chosen shall select the third, and the amount of the value of said plant agreed upon, upon their oaths, by the three appraisers so chosen, shall be the price to be

paid for the said electric works by the said city.

Your orator further complains and alleges that the said Alonzo F. Dexter, accepted the terms and conditions of the said ordinance or franchise and within ninety (90) days after the passage thereof, began the erection of said electric light works within said city and within one (1) year thereafter did complete the same and had the same in working order, complying in all respects with the requirements of said ordinance except in so far as further compliance therewith was waived by the said city; and that thereby the said city bound itself and entered into a contract with the said Alonzo F. Dexter, or his successors and assigns, at the expiration of the said period of twenty-one (21) years to purchase of the said Alonzo F. Dexter, or his successors, the electric light plant which they shall own in the said city at the expiration of the said period, built and maintained in pursuance of the said contract, and upon the terms stated in the said contract, unless the said city shall then choose or elect not to buy the same but in lieu thereof to grant to the said grantee or his successors, a further extension of the privileges or franchises set forth in the said contract.

In pursuance of the said contract and of his acceptance thereof, the said Alonzo F. Dexter, proceeded to and did erect on the streets, alleys and public grounds of said city, the poles, posts and wires necessary therefor and established the said light plant and the necessary machinery for operating and maintaining the same to all intents and purposes in full compliance with the said contract except as the same were waived as aforesaid.

III.

That afterwards by successive conveyance, the said

electric light plant, franchise and contract became the property of one William Williamson, as the successor of the grantee in the said contract, long before the expiration of the term of said contract, and the said William Williamson became the owner of all the rights and privileges of the said Alonzo F. Dexter under the said contract, and that the same were sold and transferred to the said William Williamson as said successor, and the said William Williamson became, in all respects and to all intents and purposes the representative and successor of the said Alonzo F. Dexter, in the said contract and under the rights, privileges and franchises created thereby, and with respect to all the property of every kind and nature connected with and apurtenant to the said contract, franchise and the electric light plant and works constructed in accordance therewith. Including all wires, poles, dynamos, meters and each and every article and thing entering into and making a part of the operating and going electric light plant which was constructed in pursuance of, and under the terms of said ordinance, and including the existing connections with the property of the customers and users of electric lights, and together with the established trade and good will of the said business.

IV.

That on the second (2nd) day of January, one thousand eight hundred and ninety-nine (1899), the said William Williamson, then a resident of the town of Wataga, in the state of Illinois, for value received made, executed and delivered to The Crippen-Lawrence Investment company, a corporation under the laws of Colorado, resident in the stat of Colorado, under his hand and seal, a certain negotiable bond or writing obligatory, bearing date on that day, in the sum of Ffteen

Thiusand Dollars ($15,000.00), in and by which, he, the said William Williamson, promised and obligated himself to pay to the said The Crippen-Lawrence Investment Company or order, the said sum of Fifteen Thousand Dollars ($15,000.00) *nineteen* (19) *years* after date thereof, with interest thereon at the rate of two (2) per cent per annum, payable semi-annually; said interest being represented by thirty-eight (38) coupons attached to, and forming part of the said bond; a true copy of the said bond with all coupons attached thereto, which remain unpaid, is hereto attached marked "Exhibit B" and made a part of the bill of complaint as by the said bond, ready to be produced by your orator, as this court shall direct, will more fully appear. And on the same date, the said William Williamson, to secure payment of the principal debt and interest mentioned in the said bond, did, at the same time, execute under his hand and seal, and deliver to the said The Crippen-Lawrence Investment Company, a mortgage bearing even date with the said bond and conditioned for the payment of the said sum of fifteen thousand dollars ($15,000.00), with interest thereon according to the condition of the said bond, by which the said mortgagor mortgaged unto the said The Crippen-Lawrence Investment Company in fee, certain lands and real estate in Clay county, Kansas, the description of which is fully set forth in the copy of mortgage hereunto attached, marked Exhibit C, which mortgage was duly acknowledged and afterwards recorded as a mortgage in the office of the register of deeds of the said county of Clay in which all of the said mortgaged property was located on the fifth (5th) day of April, A. D. one thousand eight hundred and ninety-nine (1899) and duly recorded in said office in book sixty (60) of mortgages, at pages five hundred thirteen (513) to five hundred seventeen

(517) inclusive; as by the said mortgage and the certificate of acknowledgement and of the recording thereof, endorsed thereon, and ready to be produced as this court shall direct, will more fully appear.

Thereafter and on or about the second (2nd) day of June, one thousand eight hundred ninety-nine (1899) the said The Crippen-Lawrence Investment Company, in due course of business, sold and transferred the said mortgage bond, and all coupons attached thereto, to your orator and at the same time the said The Crippen-Lawrence Investment Company, by writing its corporate name upon the back of said bond and upon the back of each of the said coupons, by, and through its president, and by delivering said bond and coupons to your orator endorsed and delivered in due course of business, the said bond and all of said coupons, to your orator, who ever since has been and now is, the owner and holder thereof, and by the endorsements upon said bond and coupons, ready to be produced as this court shall direct will more fully appear, and copies of said endorsements are set forth as part of Exhibit B, hereto attached and made part of this bill of complaint.

That at the same time the said The Crippen-Lawrence Investment Company, sold, transferred, endorsed and delivered said bond and coupons to your orator, the said Crippen-Lawrence Investment Company, by an instrument in writing under its seal, assigned, transferred and delivered to your orator, all of its right, title and interest in, and to the said mortgage and the note thereby secured, and the execution of the assignment so made was by the said The Crippen-Lawrence Investment Company, by its proper officers, duly acknowledged before a notary public in the city of Denver and the state of Colorado, as by said assignment and certificate of acknowledgement, ready to be produced as this court

shall direct, will more fully appear, and a true copy of said assignment and certificate of acknowledgement is incorporated in, and made a part of "Exhibit C," hereto attached, and is made a part of the bill of complaint and your orator has ever since been, and now is, the owner and holder of said mortgage, and all rights thereunder.

V.

That the said mortgage debt is not yet due, and that all interest matured thereon has been paid; but that the whole of the principal sum secured thereby remains an unpaid indebtedness to your orator; and your orator is still the owner and holder of said bond and mortgage; that the said William Williamson is now deceased and has been deceased more than three (3) years and all his assets and property have passed into the hands, possession and ownership of his heirs and devisees and that there is now no person personally liable to your orator upon the said bond and that your orator has no recourse for the payment of the said bond except as the same might be found in the security afforded by the said mortgage and the property covered thereby.

VI.

That the said franchise created by the said ordinance aforesaid, and the said electric light plant and the machinery connected therewith for its operation and each and every part and portion of the said electric light plant and the contract, franchise and privileges under which it was owned and operated were erected upon or were part or parcel of the property included in said mortgage deed and each and every part thereof, constituted a part of your orator's security for the said indebtedness, including all the wires, poles, dynamos.

meters and other machinery, and the right to maintain the said plant and its connections in the streets of the said city and all the rights and privileges held under the said ordinance. And your orator avers that with the said electric light plant and the rights and privileges created by the said ordinance and the right to maintain the same in the streets in pursuance of the said contract, your orator's securities would be greatly impaired and reduced.

VII.

That on the twenty-second (22) day of April, one thousand nine hundred and seven (1907), the said period of twenty-one (21) years expired and that previous thereto the said defendant, the city of Clay Center, its mayor and city council proceeded to and did repudiate the said contract and to disavow the same and in various and sundry ways manifested an intention not to comply with that portion or part of the said contract which obligates the said city to purchase the said plant if it should refuse in the exercise of its option, to grant an extension of the privileges provided for in the said ordinance, and have entirely refused either to purchase the same or to grant an extension of said privileges, and have threatened and are about to destroy the property constituting and composing said electric light plant by cutting down and destroying the poles and wires existing on the streets of said city, upon and by which the customers of the said plant are supplied with electric current under and by virtue of the said contract and have directed and ordered the owner of the said plant, being a successor of the said grantee in said ordinance, to remove from the streets of the said city, its poles and wires, and has threatened and now threatens that if said poles and wires upon which the business of the said elec-

tric light works is conducted be not removed, that the said city, through its officers, will cause same to be removed against the will and consent of the owners and will cause same to be wholly destroyed and the said plant and electric works to be dismantled and its poles and wires connected with the residences and places of business of its customers, be broken up and destroyed. And the said defendants will carry their said threats into execution unless restrained and enjoined therefrom by the order of this court. And your orator avers that if the said defendant shall cause the said poles and wires to be removed as it threatens to do and is about to do the said electric light works would be destroyed, the value thereof by reason of the destruction of the established and going business would be destroyed, and the security of your orator for the indebtedness due to it upon the said bond of the said William Williamson would be greatly impaired, damaged and reduced to the amount of more than ten thousand dollars ($10,000.00) all of which would be a great and irreparable damage to the orator.

VIII.

And your orator further says to your honors that since the execution of the said mortgage deed and the bond secured thereby and subject to all the rights of your orator by reason thereof, the said defendant, the Clay Center Light & Power Company, has become, and now is, as your orator is informed and believes, the owner and in possession of the said electric plant in the city of Clay Center and is engaged in the operation of same under the said contract and ordinance as the successor and assigns of the said Alonzo F. Dexter, but that all of the rights of the said defendant, the Clay Center Light & Power Company are subject, junior and

inferior to the mortgage lien of your orator upon the property, rights, franchises and privileges held under the said ordinance.

That the defendant, Clay Center Light and Power Company, is now and has been during all of the time mentioned herein, in the possession of said electric light and power plant, poles, wires, connections, and business, and operating the same for the benefit of itself as well as the security for your orator's lien thereon: that the said city of Clay Center, defendant herein, and its mayor and city council have no lawful right, power or authority to interfere with the use, occupation and ownership of the said electric light plant, business and equipment, and no power or authority whatsoever to interfere or in anywise prevent the Clay Center Light and Power Company from carrying on its private business in the furnishing of electric power and light to its private customers by the use of said poles, wires and other equipment, aforesaid. Your orator further avers that the destruction or injury of any of the said equipment and plant of the said Clay Center Light and Power Company, through, under, or by virtue of any orders of said city and its mayor and council would be unlawful and would have the effect of greatly impairing, and probably destroying the entire security of your orator afforded to it by its said lien.

In consideration whereof and forasmuch as your orator is remediless in the premises, at and by, the strict rule of the common law and has no adequate remedy at law and is only relievable in the court of equity where matters of this kind are cognizable and relievable; to the end therefore that your orator may have that relief which it can only obtain in the court of equity and that the said defendants may answer in the premises, but not upon oath or affirmation, an answer on oath being

hereby specifically waived by the orator; therefore, may it please your honors to grant to your orator a writ of injunction *pendente lite*, issuing out of, and in accordance with the rules and practice of, this honorable court, to be directed to the said defendants, the City of Clay Center and its mayor and councilmen as aforesaid to restrain them, their agents, servants, employees and confederates from interfering, in any wise, with any of the property, articles and things pertaining to the said electric light plant and franchise, and from removing, interfering with, or in any wise disturbing the poles and wires belonging to the said electric light plant, or with any of the property, of any kind or nature, belonging to, or connected therewith, or used by the owners in operating and conducting the said electric light works; and also a restraining order to the same effect until the application for the said injunction can be heard.

And your orator further prays, that upon final hearing it be adjudged and decreed by this court that the Clay Center Light and Power Company, as the successor of the original grantee and beneficiary under said original contract between the city of Clay Center and said Dexter is the owner and entitled to the peaceable possession and use of said electric light plant and said equipment without interference, insofar as it furnishes electric power and light to its private customers by the use of said plant and equipment, by said city of Clay Center and said mayor and city council thereof, subject however, to the lien and right of your orator, as the holder of said bonds and coupons hereinbefore described; and, that it may please your honors to grant unto your orator a perpetual injunction strictly restraining and enjoining the said city of Clay Center and said mayor and city council thereof, as well as all of the servants, agents, attorneys and employees of said city of Clay

Center, and all other persons whomsoever subject to the jurisdiction of this court, from in anywise whatsoever interfering with the use of the said electric light plant and the said equipment in the distributing of electricity to private consumers and customers of said electric light plant.

May it please your honors to grant to your orator awrit of subpoena to be directed to the said defendants and each and all of them, thereby commanding them at a certain time and under certain penalties therein to be limited, personally to appear before this honorable court, and then and there, full, true, direct and perfect answer make to all and singular, the premises, and to stand, perform and abide by such order, direction and decree as may be made against them in the premises and as shall seem meet and agreeable to equity; and that your orator may have such further or other relief in the premises as the nature of the circumstances of the case may require.

And your orator will ever pray.

C. C. COLEMAN,
F. L. WILLIAMS,
D. W. MULVANE,
C. E. GAULT,
D. R. HITE,

Solicitors for Complainant.

. . . . . .

Of Counsel.

In the above bill the only jurisdictional grounds alleged was diversity of citizenship. To said bill of complaint, the defendant, the city of Clay Center, filed its demurrer which was and is in the following language to-wit:

In the Circuit Court of the United States, in and for the District of Kansas, First Division.

IN EQUITY.

The Merrimack River Savings Bank, a Corporation, *Plaintiff*

vs.

The City of Clay Center, Kansas, a Municipal Corporation; George W. Hanna, Mayor of said City; O. L. Slade, G. P. Randall, W. D. Vincent, L. Brightweser, E. D. Hartwell, and S. D. Tripp, composing the City Council of the said City, and the Clay Center Light & Power Company, a corporation. *Defendants*

DEMURRER ON THE PART OF THE CITY OF CLAY CENTER, THE MAYOR AND THE COUNCILMEN OF THE CITY OF CLAY CENTER, MENTIONED IN THE TITLE HEREIN.

These defendants, the city of Clay Center, Kansas and George W. Hanna, mayor of the said city, and O. L. Slade, G. P. Randall, W. D. Vincent, L. Brightweser E. D. Hartwell, and S. D. Tripp, councilmen of said city of Clay Center, Kansas, not confessing all or any of the matters in the bill of complaint contained, to be true as therein set forth, do demur to said bill for the reason that the same does not state such a case nor contain any such matters of equity which entitle the

complainant to any relief against these defendants as prayed for, and for the further reason that said bill of complaint shows upon its face that the franchise set out thereinunder by which complainant claims the right of the Clay Center Light & Power Company to maintain its poles and wires on the streets of Clay Center, Kansas had expired long before this action was begun, and because said bill of complaint further shows upon its face that this court has no jurisdiction to determine and try the matters between the parties as set out in said bill of complaint, because the city of Clay Center and the Clay Center Light & Power Company are on opposite sides of the controversy, and both being citizens of the state of Kansas, there is not the necessary diversity of citizenship.

F. B. DAWES,
R. C. MILLER,

Attorneys and Solicitors for the above named Defendants.

After this demurrer was filed which points out the fact that the complainant, the holder of the mortgage and the Clay Center Light & Power Company, one of the defendants, should be placed on the same side of the controversy and that by such an arrangement there would be citizens of the state of Kansas on opposite sides of the controversy, the complainant asked and was granted leave to file an amended bill of complaint. In the amended bill of complaint an attempt is made to confer jurisdiction by an attempt to show that the judgment of the supreme court of Kansas, in some way deprives the complainant of property without due process of law and that in some way such judgment impaired the

obligation of the contract made with Dexter, his successors and assigns. Said amended bill was and is in the following words and figures, to-wit:

AMENDED BILL.

In the Circuit Court of the United States, for the District of Kansas. First Division.

The Merrimack River Savings Bank,
Complainant

vs.

The City of Clay Center, Kansas; George W. Hanna, Mayor of said City: and O. L. Slade, W. D. Vincent, L. Brightweser, E. D. Hartwell, and S. D. Tripp, the Mayor and City Council of said City of Clay Center; and The Clay Center Light and Power Company,
Defendants

AMENDED BILL OF COMPLAINT.

To the Honorable Judges of Said Circuit Court:

The Merrimack River Savings Bank, a corporation organized and existing under and by virtue of the laws of the state of New Hampshire, and a citizen and resident of the state of New Hampshire, presents this its bill of complaint against the city of Clay Center, a city of the first class, existing under and by virtue of the laws of the state of Kansas, and a citizen and resident of the state of Kansas, and of the first judicial division thereof, and against the individual defendants above

named, all of whom are citizens and residents of said state of Kansas and of the aforesaid first judicial division thereof, and against the Clay Center Light and PowerCompany,a corporation now and heretofore existing and incorporated under the laws of the state of Kansas, and a resident and citizen of said state of Kansas and of said first division thereof; and, thereupon your orator complaining says:

I.

That the amount in controversy in this suit exceeds the sum of $2,000.00, exclusive of interest and costs.

II.

That heretofore, to-wit: on April 25, 1886, the defendant the city of Clay Center duly entered into a contract with one A. F. Dexter whereby the said Dexter, his successors and assigns, became the owner of the right of erecting and maintaining posts, wires and other means adapted to the conveyance of electricity to the inhabitants of said city; that a copy of said contract so entered into is attached to the original bill filed herein as "Exhibit A"; that by the terms of said contract between said city and said Dexter the same was to continue in force for a period of 21 years from and after the date thereof, upon the performance by the said Dexter of certain conditions precedent mentioned in said contract that said city further agreed that at the expiration of the time mentioned in said contract it would either purchase the tangible property contemplated to be constructed under the terms of said contract, or, failing to so purchase said property, that said city would extend the terms of such contract for the additional period described therein;

That said Dexter upon the execution of said con tract duly performed all of the said conditions on his part to be performed as therein provided, and in and about such performance expended a large sum of money in the construction and equipment of an electric light and power plant in said city of Clay Center, by and through which electric power was furnished to said city and to the inhabitants thereof;

That afterwards, by due conveyance, the said elec tric light plant together with the franchises and contract rights pertaining thereto passed to one William William son, who by such conveyance became and was long be fore the expiration of the orignal time mentioned in said contract the owner of all and singular the property rights and privileges so, as aforesaid, contracted and granted to the said Dexter; and, the said Williamson, by such sale and conveyance to him, became and was the owner of all and singular such property and such rights franchises and privileges; and the said Williamson thereby entered upon the possession of all of the property pertaining to said electric light and power plant including all poles, wires and other property pertaining to such plant, together with the good will and business connections thereof; that at the time the said William son came into the ownership and possession of said property the said electric light and power plant was engaged in the business, as a going concern, of furnishing to the inhabitants of the city electric power and said inhabitants, or many of them, sustained towards said electric plant the relation of purchasers and users of the electric power furnished by said plant, both for light and power

That on or about January 2, 1899, the said Wil liamson, then a citizen and resident of the state of Illinois, duly executed to the Crippen-Lawrence Investmen Company, a corporation then existing under the laws

of the state of Colorado and residing in said state, a certain negotiable bond by the terms of which the said Williamson promised to pay to the said investment company or its order nineteen years after the date thereof the sum of $15,000.00, with interest thereon at the rate of two per cent per annum, which interest by the terms of said bond was payable semi-annually and was evidenced by thirty-eight certain coupons attached to and forming a part of such bond; that at the same time and as a part of the same transaction the said Williamson duly executed to the said investment company his certain indenture of mortgage, wherein and whereby the said Williamson conveyed unto the said investment company all of the interest of the said Williamson in, to about and concerning said electric light plant, together with all of its appurtenances, including said wires, poles and other electric equipment. Your orator refers to a copy of such indenture of mortgage attached to the original bill herein as "Exhibit C" and makes such copy a part of this amended bill; that the aforesaid indenture of mortgage was duly recorded in the month of April 1899, in the office of the register of deeds of Clay county in the state of Kansas; and, that thereafter and long before the maturity of said note the said investment company in the due and ordinary course of business sold, endorsed and transferred the said bond, together with the interest coupons attached thereto to your orator; and, at the same time and as a part of the said transaction, on or about June 2, 1899, the said investment company duly assigned unto your orator the said indenture of mortgage so executed as aforesaid by the said Williamson to the said investment company; and on and after June 2, 1899, your orator became and ever since has been the owner and holder for value of said note and of said mortgage, and said note and said mortgage are now the property of your orator.

III.

Your orator avers that during the whole time since it acquired said note and mortgage the interest thereon has bee paid unto your orator as the same became due but no part of said principal sum has been paid, and by virtue of such bond and such indenture of mortgage your orator is the owner and holder of a valid first mortgage lien upon the property hereinbefore described consisting of said electric light plant, including said poles, wires and other equipment; and, by virtue of said indenture of mortgage your orator is the owner and holder of a first mortgage lien upon all and singular the tangible property, consisting of said electric light plant and, also, upon the intangible property, consisting of the good will and business connections of said plant and business;

Your orator further avers that the said William Williamson, maker of said bond and grantor in said mortgage, is dead, and all of his property and assets have passed into the ownership and possession of his heirs at law and of certain devisees named in his will and, that your orator has not now any recourse against the maker of said bond for the payment thereof, but does and must depend upon the security therefor, evidenced by said indenture of mortgage.

IV.

That, on or about April 22, 1907, at the expiration of the period mentioned in said original contract between said city of Clay Center and said Dexter, the defendant city, acting by and through the individual defendants named herein, at a regular session of the city council of such city attempted to repudiate and annul said contract so made as aforesaid with Dexter; and, without any

notice to your orator attempted to, by pretended corporate action of said city, annul and destroy any and all rights of your orator, as the holder of a lien upon said property connected with said electric light plant and, without notice to your orator took some action with the details of which your orator is unacquainted, resulting in a denial by said city of any liability whatsoever growing out of said contract so entered into with the said Dexter and refused to recognize the terms of the same. Your orator further avers that, influenced so to do by a determination to violate and impair the obligation of said contract of April 22, 1886, the said city of Clay Center and the said individual defendants, pretending to act officially in the premises, threatened to destroy said electric light plant by tearing down the poles and wires and other electric equipment connected therewith, and to destroy and impair the business of said electric light plant by the physical destruction of the means employed thereby in the furnishing of electrical power and light to the inhabitants of the city of Clay Center; that said individual defendants, pretending to act as members of the council of said city, and said city have threatened to and will, if not restrained by the orders of this court, forcibly remove from the streets and alleys of said city all of the electric equipment, including posts and wires belonging to and forming a part of the electric light plant, which, as aforesaid, was conveyed to your orator as security for the payment of said bond so executed by the said Williamson to the said investment company; and, the said individual defendants and said city threaten to and will, unless restrained by the orders of this court, break up and destroy said poles wires and other equipment connected with said electric light plant, and thereby destroy the usefulness of said electric light plant and prevent it from carrying out it

contracts with a large number of the inhabitants of the city of Clay Center with whom it has business connections, and thereby the security of your orator for the payment of said bond will be inevitably destroyed to the irreparable injury of your orator in that behalf.

V.

Your orator further avers that after the execution and delivery unto your orator of said bond and said mortgage that all of the property, tangible and intangible, mentined in and referred to therein, was conveyed and transferred unto the defendant Clay Center Light and Power Company, and by the terms of such transfer the said Clay Center Light and Power Company took said property subject to the paramount mortgage, lien and right existing in your orator in that behalf; that by such transfer and conveyance, the said defendant Clay Center Light and Power Company became and now is the owner and in possession of the said electric light and power plant in the city of Clay Center, and is now engaged in the operation of the same, thereby delivering to a large number of inhabitants of said city electric light and power for profit; and, by virtue of such sale and transfer the said Clay Center Light and Power Company became and now is the successor and assignee of all and singular the rights conveyed by the contract of April 22, 1886, to the said Dexter; but your orator avers that whatever right, title or interest in or to the said tangible property, and in or to the rights, privileges and franchises conveyed to the said Dexter under the said original contract is now held or owned by said Clay Center Light and Power Company, are subject junior and inferior to the mortgage lien held by your orator under and by virtue of the sale, endorsement and trans-

fer to your orator of said bond, and the assignment and transfer to unto your orator of said indenture of mortgage: that said Light and Power Company has all of the time since it took possession of said electric light and power plant recognized the lien of your orator and no contraversy exists between your orator and said Light and Power Company with reference to your orator's said lien; but your orator avers that notwithstanding the rights of your orator in that behalf the said city of Clay Center and the above named individual defendants, consisting of its mayor and council, have threatened to and will, unless restrained by the authority of this court, interfere with the use, occupation and ownership of said electric light plant, its business and equipment, by cutting down and otherwise destroying the poles, wires and other electric equipment pertaining to said plant for the expressand avowed purpose of preventing said Light and Power Company from carrying on the business of furnishing to the inhabitants of said city electric power and light; and your orator avers that the said city of Clay Center and the said individual defendants, pretending to act as the mayor and city council of said city, have no power, right or authority to so arbitrarily destroy the property and business of said Light and Power Company and so, as aforesaid, to impair and destroy the security upon which your orator must depend for the ultimate satisfaction of said bond and the recovery by your orator of said sum of $15,000.00 so, as aforesaid, expended by your orator upon the faith anl credit of said bond and said lien; and your orator avers that neither said city of Clay Center, nor said individual defendants, have any lawful right, power or authority to so deal with the property upon which your orator has said lien; and, that the result of such action, if permitted to be carried out, would impair and probably destroy the security of your orator afforded by its said lien.

VI.

Your orator further avers that at orabout the date of the expiration of the original time mentioned in said contract between said city and said Dexter of April 22, 1886, the said Light and Power Company commenced an action in the district court of clay county, Kansas, a court of general jurisdiction, for the purpose of compelling the specific performance by said city of the terms of said original contract so entered into by said city wit hthe said Dexter; that your orator was not made a party to such action; that by the consideration of said district court of Clay county, Kansas, the said Light and Power Company recovered a judgment against the said city of Clay Center for the specific performance of the terms of said original contract of April 22, 1886; that thereafter, in the month of June, 1908, upon proceedings brought by said city for such purpose, in the supreme court of Kansas, it was held and decided that the judgment of said district court of Clay county, Kansas, in favor of said Light and Power Company was erroneous and such judgment was on or about September, 1908, reversed; and a mandate of said supreme court of Kansas duly issued out of said court directing the said district court of Clay county to enter judgment in favor of said city to the effect that said contract of April 22, 18866, in so far as it granted unto the said Dexter any additional time, beyond the specific time mentioned therein, was utterly void and not binding upon said city;

Your orator avers that it was not a party to the proceedings in the supreme court of Kansas wherein and whereby such a judgment and decision was rendered; that said judgment and decision of said supreme court denied unto your orator the equal protection of

the laws, if such judgment and decision of said supreme court so destroying and annulling said contract is permitted to have the effect now claimed for such decision by said city and individual defendants herein; by virtue of the action of said Kansas supreme court, your orator will be deprived of its property rights in, about and concerning said electric light plant without due process of law in this—that your orator has had no opportunity to be heard nor has your orator had any notice of a hearing in respect to your orator's rights growing out of the execution of said bond and the transfer of the same unto your orator and the existence of said first mortgage lien;

Your orator further avers that said contract of April 22, 1886, is not void in respect of any of its terms; that the decision and judgment of the supreme court of Kansas in that respect is a denial of the equal protection of the laws to persons and corporations duly transacting their business in the state of Kansas; that said decision and judgment of said supreme court impaired the obligation of the contract originally made by the said city of Clay Center with the said Dexter; and, that to now permit said city of Clay Center and said individual defendants to destroy the property upon which your orator must depend for the satisfaction of its claim growing out of the execution to your orator of said bond and said mortgage upon the mandate of said supreme court of Kansas, in a cause where your orator had no opportunity to be heard would be to deprive your orator of his property without due process of law and contrary to the constitution of the United States and particularly to the fourteenth amendment to such constitution.

VII.

Your orator further avers that while it is some-

times pretended by the city of Clay Center and by said individual defendants that they are authorized so to do, by said decision of said supreme court, your orator avers that such pretense is a mere sham; that nothing in the decision of said supreme court justifies the destruction of the property upon which your orator has its lien aforesaid; but your orator avers that if said pretense is justified by such decision then your orator avers that by and through such instrumentality the state of Kansas is depriving your orator of its property without due process of law; and, that if said individual defendants and said city are justified by said decision in destroying said property by tearing down said poles, destroying the business connections of said electric light plant and otherwise interfering with the conduct of said business as a going concern, that then and in that event by such instrumentality the said state of Kansas is depriving your orator of its security, and unless such action on the partof said city and said officials, individual defendants herein, is restrained by the authority of this court, your orator will have been deprived of the security mentioned and described in said indenture of mortgage without having any opportunity to be heard and without having its day in court.

The premises considered, your orator prays as was prayed in its original bill herein; and your orator further prays that upon the coming in of proof to this court that your orator has served upon the said individual defendants and said city of Clay Center a copy of this its amended bill of complaint that your orator have an order that said individual defendants and said city of Clay Center be required to answer this amended bill of complaint; but your orator expressly waives an answer hereto under oath; and, that said individual defendants and said city of Clay Center be required to

stand to and abide by any orders, judgments, decisions and decrees that may be lawfully entered in this court.

Your orator further prays that the said Light and Power Company be required to show cause, if any it have or has, why the relief which your orator prays should not be granted unto your orator; for that your orator avers that by virtue of the sale and transfer of the aforesaid property and business to said Light and Power Company such property and business is held by said Light and Power Company subject to all and singular the rights held by your orator under and by virtue of said bond and said indenture of mortgage;

And your orator prays for such other and further relief as your honor may seem propery.

C. C. COLEMAN,
F. L. WILLIAMS,
Solicitors for Complainant.

D. R. HITE,
MULVANE & GAULT,
Of Counsel.

A true Copy—Attest: ..... Clerk.
(SEAL.)

To said amended bill the defendant, the city of Clay Center, and its mayor and councilmen, filed their demurrer which said demurrer was and is in the following language, to-wit:

In the Circuit Court of the United States, in and for the District of Kansas, First Division.

IN EQUITY.

The Merrimack River Savings Bank, a Corporation, *Plaintiff,*

vs.

The City of Clay Center, Kansas, a Municipal Corporation; George W. Hanna, Mayor of said City; O. L. Slade, G. P. Randall, W. D. Vincent, L. Brightweser, E. D. Hartwell, and S. D. Tripp, composing the City Council of the said City, and the Clay Center Light & Power Company, a Corporation, *Defendants.*

DEMURRER ON THE PART OF THE DEFENDANT, THE CITY OF CLA YCENTER. AND THE MAYOR AND COUNCILMEN OF THE CITY OF CLAY CENTER, MENTIONED IN THE TITLE HEREIN TO THE ORIGINAL AND AMENDED BIILL OF COMPPLAINT FILED HEREIN.

Come now these defendants, the city of Clay Center, Kansas, and George W. Hanna, mayor of said city, and O. L. Slade, G. P. Randall, W. D. Vincent, L. Brightweser, E. D. Hartwell, and S. D. Tripp, councilmen of said city of Clay Center and not confessing all or any of the matters in the bill of complaint contained to be true as therein set forth, and demur to said original and amended bill of complaint filed herein for the reason that neither of the same, nor both together state such a

case nor contain any such allegations of matters of equity which entitle the complainant to any relief in equity against these defendants as prayed for. For the further reason that the said bill of complaint and amended bill of complaint show upon their faces that the franchise set out therein under which complainant claims the right of the Clay Center Light & Power Company to maintain its poles and wires on the streets of Clay Center, Kansas, had expired by limitation long before this action was begun, and that said complainant is not entitled to claim any equitable relief in the premises as prayed for.

For the further reason that the said original bill and amended bill of complaints further show on their faces, considered separately or together, that this court has no jurisdiction to determine and try the matters between the parties set out in said bills of complaint for the reason that said bills show that the Clay Center Light & Power Company is on the same side of the controversy with the complainant, while the defendant, the city of Clay Center, is on the other side of said controversy and said Light & Power Company and city of Clay Center are both citizens of Kansas.

For the further reason that said original bill of complaint and the amended bill considered separately or both together show that there is no federal question involved in this action so as to give the court jurisdiction independent of diversity of citizenship.

Wherefore, these defendants pray the judgment of the court to determine whether they shall be compelled to further answer said complaint and amended complaint and also pray to be dismissed with their costs.

F. B. DAWES and
R. C. MILLER,

Solicitors for the Defendant City of Clay Center, and the Mayor and Councilmen of Said City Above Named.

This matter came up before the circuit court of the United States for the district of Kansas, for argument and was argued and submitted upon brief by both parties. On February 19th, 1910, Judge Pollock handed down a decision sustaining said demurrer on the ground that neither the bill nor amended bill contained sufficient allegations to give the court jurisdiction and ordered that unless the complainant should amend its bill showing jurisdiction in the circuit court before the rule day in March, 1910, the bill would stand dismissed.

After the handing down of this decision and upon rule day in March, the complainant, the Merrimack River Savings Bank, filed its second amended bill of complaint, which was and is in language as follows, to-wit:

In the Circuit Court of the United States for the District of Kansas. First Division.

The Merrimack River Savings Bank,
Complainant.

vs.

The City of Clay Center, Kansas; George W. Hanna, Mayor of said City; and O. L. Slade, G. P. Randall, W. D. Vincent, L. Brightweser, E. D. Hartwell and S. D. Tripp, the Mayor and City Council of said City of Clay Center; and the Clay Center Light and Power Company,
Defendants.

SECOND AMENDED BILL OF COMPLAINT.

To the Honorable Judges of Said Circuit:

The Merrimack River Savings Bank, a corporation organized and existing by virtue of the laws of the state

of New Hampshire, and a citizen and resident of the state of New Hampshire, having been duly authorized to again amend its bill of complaint presents this its second amended bill of complaint against the city of Clay Center, a city of the first class, existing under and by virtue of the laws of the state of Kansas, and a citizen and resident of the state of Kansas, and of the first judicial division thereof, and against the individual defendants above named, all of whom are citizens and residents of the said state of Kansas and of the aforesaid first judicial division thereof, and against the Clay Center Light and Power Company, a corporation now and heretofore existing and incorporated under the laws of the state of Kansas, and a resident and citizen of said state of Kansas and of said first judicial division thereof; and, thereupon, your orator complaining says:

I.

That the amount in controversy in this suit exceeds the sum of $2,000.00, exclusive of interest and costs.

II.

That heretofore, to-wit: on April 22, 1886 the defendant, the city of Clay Center duly adopted an ordinance and thereby entered into a contract with one A. F. Dexter whereby the said Dexter, his successors and assigns, became the owner of the right of erecting and maintaining in and upon the streets, lanes and alleys of the city of Clay Center, Kansas, defendant herein, poles, wires and other means adapted to the conveyance of electricity to the inhabitants of said city; that a copy of the ordinance constituting said contract so entered into is attached hereto as "Exhibit A"; that by the terms of said contract and ordinance the same was to continue in force for a period of 21 years from and after

the date thereof, upon the performance by the said Dexter of certain conditions precedent mentioned in said contract; that said city further agreed that if at the expiration of the time mentioned in said contract it "shall refuse to grant a further continuance of these privileges" it would purchase said property at a valuation to be determined as therein provided.

That said Dexter upon the execution of said contract duly performed all of the said conditions on his part to be performed as therein provided, and in and about such performance expended a large sum of money in the construction and equipment of an electric light and power plant in said city of Clay Center and by erecting poles in and upon the said streets and alleys and stretching in and upon said streets and alleys, wires thereon by which electric light and power were, for lighting its streets and alleys, furnished to said city and still are furnished to the inhabitants thereof;

That afterwards, by due conveyance, the said electric light plant, together with said poles, wires, privileges, business connections and franchises and contract rights pertaining thereto passed to one William Williamson, who by such conveyance became and was long before the expiration of the original time mentioned in said contract the owner of all and singular, the property, rights and privileges so, as aforesaid, contracted and granted to the said Dexter; and, the said Williamson, by such sale and conveyance to him, became and was the owner of all and singular such property and such rights, franchises and privileges; and, the said Williamson duly entered upon the possession of all of the property pertaining to said electric light and power plant, including all poles, wires and other property pertaining to such plant, together with the good will and business connections thereof; that at the time the said Williamson came into

the ownership and possession of said property the said electric light and power plant was engaged in the business, as a going concern, of furnishing to said city and to the inhabitants thereof electric light and power distributed from said plant over, upon and along said poles and wires, etc., upon said streets and said inhabitants, or many of them sustained towards said electric plant the relation of purchasers and users of the electric light and power furnished by said plant.

That on or about January 2, 1899, the said Williamson, then a citizen and resident of the state of Illinois, duly executed to the Crippen-Lawrence Investment Company, a corporation then existing under the laws of the state of Colorado and residing in said state, a certain negotiable bond by the terms of which the said Williamson promised to pay to the said investment company or its order nineteen years after the date thereof the sum of $15,000.00, with interest thereon at the rate of two per cent per annum, which interest by the terms said bond was payable semi-annually and was evidenced by thirty-eight certain coupons attached to and forming a part of such bond; that at the same time and as a part of the same transaction the said Williamson duly executed to the said investment company his certain indenture of mortgage wherein and whereby the said Williamson conveyed unto the said investment company all of the interest of the said Williamson in, to, about and concerning said contract, franchises, privileges and electric light plant, together with all of its appurtenances, including said wires, poles and other electric equipment and all of its business connections to secure the payment of said negotiable bond; that the aforesaid indenture of mortgage was duly recorded in the month of April, 1899, in the office of the register of deeds of Clay county in the state of Kansas; that thereafter and long before the maturity of said note the said investment company

in the due and ordinary course of business for a valuable consideration sold, endorsed and transferred the said bond, together with the interest coupons attached thereto, to your orator; and, at the same time and as a part of the said transaction, on or about June 2, 1899, the said inestvment company duly assigned unto your orator the said indenture of mortgage so executed as aforesaid by the said Williamson to the said investment company to secure the payment of said bond; and, on and after June 2, 1899, your orator became and ever since has been the bona fide owner and holder for value of said note and of said mortgage, and said note and said mortgage are now the property of your orator.

III.

Your orator avers that during the whole time since it acquired said note and mortgage the interest thereon has been paid unto your orator as the same became due, but no part of said principal sum has been paid, and by virtue of such bond and such indenture of mortgage your orator is the owner and holder of a valid first mortgage lien upon the property hereinbefore described, consisting of said contract, rights, privileges and franchises of said electric light plant, including said poles, wires and other equipment; and, by virtue of said indenture of mortgage your orator is the owner and holder of a first mortgage lien upon all and singular the tangible property, consisting of said electric light plant, and, also, upon the intangible property, consisting of the franchises, privileges, good will and business connections of said plant and business;

Your orator further avers that the said William Williamson, maker of said bond and grantor in said mortgage, is dead, and all of his property and assets have passed into the ownership of his heirs at law and

of certain devisees named in his will; and, that your orator has not now any recourse against the maker of said bond for the pyament thereof; but does and must depend upon the security therefor, evidenced by said bond and said indenture of mortgage securing the same.

IV.

Your orator avers that after the execution and delivery unto your orator of said bond and mortgage all of the property, tangible and intangible, and all of the rights and franchises mentioned and referred to therein were duly transferred and conveyed unto the defendant, Clay Center Light & Power Company, a Kansas corporation incorporated in July, 1906, and by virtue of such transfer and conveyance the said Clay Center Light & Power Company took possession of all of said property, rights and franchises subject to the paramount mortgage, lien and right conferred upon and existing in your orator in that behalf; that by such transfer and conveyance the defendant, Clay Center Light & Power Company long prior to the beginning of this suit became and now is the owner and in possession of all and singular the property, rights, franchises and privileges conferred by the terms of said ordinance of April 22, 1886, and for a long time prior to the beginning of this suit said Clay Center Light & Power Company was and it is now engaged in the operation of the electric light and power plant constructed and operated in pursuance of said ordinance and is now and was for a long time prior to the beginning of this suit engaged in the public business of distributing electric light and power by means of wires stretched along the poles erected by its assignors and itself in pursuance of the terms of said ordinance of April 22, 1886, along and upon the streets, alleys and public grounds of said city of Clay Center;

That said Clay Center Light & Power Company ever since it took possession of said plant and property has recognized the lien of your orator and no controversy exists between your orator and said Light & Power Company with reference to your orator's said lien; that ever since it took possession of said property said Clay Center Light & Power Company has been and is now engaged in the business of distributing electric light and power to citizens and inhabitants of the city of Clay Center, but does not now and has not since the expiration of twenty-one years from the date of said contract enjoyed or had any privileges or contract with said city in, about or concerning the furnishing of lights for the streets, lanes or alleys of said city;

That at and previous to the adoption of said ordinance and the execution of said contract of April 22, 1886, said defendant city, as a municipal corporation of the state of Kansas, was duly authorized under the laws of that state to enter into contracts with persons and corporations by which the use of the streets, alleys and grounds of said city might be granted for the purpose of erecting thereon poles carrying wires for the transmission of electricity to be used by the inhabitants of said city for light and power;

That at the time said ordinance was adopted and said contract executed the only restriction imposed by the laws of the state of Kansas upon cities of the second class (of which class defendant city was and is one) was that such cities should have no power to enter into contracts for lighting their streets and alleys to continue for a longer period than twenty-one years, but, no limitation whatever was imposed by the laws of Kansas at said time relative to the duration of contracts by which said cities granted to persons or corporations the privilege of using their public streets and alleys in carrying

on the business of transmitting electricity for light and power by means of poles and wires erected and maintained upon and along such public highways and grounds, provided such instrumentalities were constructed and maintained with due regard to public welfare, safety and convenience;

That in 1905 the state of Kansas passed a law known as chapter 121 laws of 1905, which among other things provides as follows:

"Section 1. The streets, alleys, public parks and grounds in cities of the second and third classes in the state of Kansas shall be under the control of the mayor and councilmen of the municipalities thereof and the jurisdiction over and control thereof is vested in said cities.

"Section 2. Before any person, firm or corporation shall have the right to enter upon the streets, alleys, public parks and grounds of any city of the second or third class in the state of Kansas for the purpose of piping the same for gas, heat, light, water, or for the construction of any railways, street railways, sewerage system, telephones or for any other purpose whatsoever, such person, firm or corporation must first procure the passage of an ordinance by the mayor and councilmen of such city granting unto such person, firm or corporation such right or rights and in which said ordinance shall be defined fully and at length the terms upon which said right is conceded.

"Section 3. Any person, firm, or corporation, their agents, servants or employes, who shall, without first having obtained by ordinance from such municipal authorities as hereinbefore provided, authority so to do, enter upon any of the streets alleys, public parks or

grounds of such cities and interfere with the surface thereof, or dig ditches, or obstruct the same in any way, or otherwise interfere therewith, shall be guilty of a misdemeanor for each day this act shall be thus violated, and upon conviction thereof shall be fined in any sum not exceeding one hundred dollars for each offense."

That by the said act of 1905 the state of Kansas placed the entire control of the use of the streets of said city in the hands of its officers, to-wit, its mayor and council; and, authorized said city to withhold its consent to the use of its streets and alleys upon any pretext and for any or no reason;

That in pursuance of such power and authority so granted, the said city by its mayor and council in October, 1906, duly passed a resolution declaring that said city would not consent to the said Light & Power Company's use of said streets and alleys beyond the expiration of 21 years from April 22, 1886, and, duly notified said company of said resolution; and, in March, 1907, the said city duly adopted an ordinance in terms repealing said ordinance and contract of April 22, 1886;

That in April, 1907, after the expiration of 21 years from the date of said ordinance of April 22, 1886, said Light & Power Company duly commenced an action against said city to compel it to perform the obligations of said ordinance of April 22, 1886; and, in litigation such proceedings were had in the Kansas supreme court, that said ordinance of April 22, 1886, was adjudged to be a grant to said Dexter and his assigns of the right, privilege and franchise to use the streets and alleys of said city for a period exceeding twenty-one years; and that such a grant was wholly beyond the corporate powers of said city, *ultra vires* and void. Your orator avers that it was not a party to said litigation.

VII.

Your orator avers that under said ordinance of April 22, 1886, and by virtue of the conveyance aforesaid, the said Light and Power Company has a lawful right to occupy said streets and alleys in the manner aforesaid; but said city of Clay Center and the individual defendants herein, as officers of said city, acting under and by virtue of the powers conferred upon them by said statute of 1905, relative to the control by said city of the use of its streets and public grounds and acting under the decision of said supreme court relative to said ordinance of 1886, threaten to and will, unless restrained by the order of this court, tear down, remove and utterly destroy the poles, wires and other equipment now and for some time before the beginning of this suit employed by said Light and Power Company, defendants herein, for the distribution of electric light and power to the citizens of Clay Center; that said city and said individual defendants, as officers thereof, are authorized and have the right so to tear down, remove and destroy the property of said Light and Power Company so employed and to institute criminal proceedings against said company and its officers and employes for continuing to use said streets and alleys for said purpose by virtue of the authority conferred upon cities of the second class by said act of 1905, and by said decision of the supreme court; that said city of Clay Center and said individual defendants have demanded of the said Light & Power Company that it forthwith remove said posts and wires from the streets and public grounds of said city, and thereby compel the said Light & Power Company to discontinue its said business of distributing electric light and power by means of said posts and wires to the citizens and inhabitants of said city; that said poles and wires are a part and parcel of, and connected

with, said electric power plant owned and used by said Light & Power Company, and constitute the only available means by which said Light & Power Company can distribute to the citizens of said city electric light and power and carry on the business for which it was incorporated and for which its property is adapted; that if said poles and wires are torn down, removed and destroyed by said city and said individual defendants, acting as officers thereof, the business and property of said Light & Power Company will be utterly destroyed and become wholly useless and thereby the security of your orator for the payment of its debt will be greatly impaired, if not made wholly worthless; that said city of Clay Center and said individual defendants unless restrained by this court, threaten to, and will by force and violence remove said poles and wires from said streets and alleys, and resort to criminal process against said Light & Power Company and its servants and otherwise interfere with and damage the business of said company with the resulting effect of impairing and destroying the aforesaid security of your orator.

Your orator avers that the statute enacted by the legislature of the state of Kansas in 1905, and hereinbefore referred to, impairs the obligation of the contract entered into by said city of Clay Center and said Dexter in 1886 under which your orator is bound to and does claim security for the payment of its debt, and, therefore, your orator avers that said act of the legislature of the state of Kansas, enacted in 1905, and hereinbefore referred to, violates that provision of the constitution of the United States prohibiting any state from passing any law impairing the obligation of contracts; and your orator further avers that the decision of the supreme court of Kansas, holding and deciding that said city of Clay Center had no power or authority to grant unto

the said Dexter and his assigns, the use of said streets and alleys for the erection thereon of poles to carry wires to distribute electric light and power to the citizens and inhabitants of said city for a longer period than twenty-one years, impairs the obligations assumed by said city under said contract and denies unto your orator the equal protection of the laws in violation of the constitution of the United States, and said threatened acts of said city of Clay Center and of the individual defendants, as officers of said city authorized by said statute and decision, to-wit: the tearing down, removing and destroying said poles and wires and thereby making worthless the property upon which your orator depends for the payment of its debt, will deprive your orator if its property without due process of law in violation of the fourteenth amendment of the constitution of the United States providing that no person shall be deprived of his property without due process of law.

The premises considered and for as much as your orator is remediless at and by the strict rule of the common law and has no adequate remedy in law and is only relievable in a court of equity where matters of this kind are cognizable, to the end therefore, that your orator may have that relief to which it is justly entitled, which it may only obtain in a court of equity, your orator prays that upon due notice of the filing of this second amended bill of complaint that said defendants and each and every one of them be required by the regular April, 1910 rule day of this court, to make true and perfect answers to the allegations and averments hereinbefore set out, but not under oath, answer oath by said defendants and each of them being expressly waived; and

Your orator further prays that the injunction *pendente lite* heretofore issued out of this court and now in full force and effect be continued as against the said city

of Clay Center and the individual defendants hereinbefore named; and

Your orator further prays that upon the coming in of proofs after issue joined that a final decree may be rendered in this cause adjudging that the ordinance of April 22nd, 1886, duly conferred upon the said Light & Power Company as assignee and grantee by mesne conveyance from the said Dexter the right to occupy the streets and alleys of said city of Clay Center for the purpose of carrying on its business of distributing electric light and power to the inhabitants of said city without interference on the part of the said city of Clay Center until and unless said city of Clay Center shall duly perform the obligations imposed upon it by the terms of said ordinance and that the final decree of this court make the said injunction hereinbefore issued, and served upon said city of Clay Center, and said individual defendants, perpetual;

Your orator prays for such other and further relief as unto your honors may seem just.

COLEMAN & WILLIAMS,
MULVANE & GAULT, and
D. R. HITE,
Solicitors for Complainant.

EXHIBIT A.

An Ordinance Providing for Lighting the City of Clay Center, Kansas, by Electricity.

Be It Ordained by the Mayor and Councilmen of the City of Clay Center:

Section 1. *Franchise, Grant of.* That Alonzo F. Dexter, of Clay Center, Kansas, his successors and assigns,

are hereby granted the right of way and authorized to use the streets, avenues, alleys and public grounds of this city for the purpose of erecting and maintaining posts and running wires thereon for the conveyance of electricity to furnish light and power for the use of said city and its inhabitants. Said poles shall be erected on the outside limits of the sidewalks on all streets and avenues and on the sides of the streets, avenues and alleys designated by the city council.

Section 2. *Size of Poles and Height of Wires.* The poles mentioned in the preceding section shall be as large, or larger than those used ordinarily for telegraph poles and the wires shall be insulated and placed high enough above the ground so as not to interfere with public travel on any of the public thoroughfares of said city or to injure or to interfere with any public or private property of said city.

Section 3. *Limit of Rates to Inhabitants.* That the said Alonzo F. Dexter, his successors and assigns, shall not charge for light furnished any of the inhabitants of this city a sum greater than the equivalent of best coal gas at two dollars per thousand cubic feet, or a sum not greater than one hundred dollars per annum per arc light of two thousand candle power, or twenty dollars per annum for incandescent light of sixteen candle power.

Section 4. *Power Required.* The said Alonzo F. Dexter, his successors and assigns shall establish within the city limits electric light works of sufficient power at all times to furnish all the light needed for the use of said city and the inhabitants thereof and shall furnish both arc and incandescent lights at prices not to exceed those named in the third section of this ordinanec.

Section 5. *Limit of Rates to City.* The said Alonzo F. Dexter, his successors and assigns shall not charge the city of Clay Center for light furnished to light its streets or public buildings a sum greater than an equivalent of best coal gas at one dollar and seventy-five cents per thousand cubic feet, either for incandescent or arc lights.

Section 6. *Rates Continued.* That Alonzo F. Dexter, his successors and assigns, shall furnish arc lights for the use of this city, of two thousand candle light power, at a sum not to exceed one hundred dollars per annum per light, and shall furnish incandescent lights sixteen candle light power for the use of said city for a sum not to exceed twenty dollars per light per annum; provided the city shall take and use not less than five such arc lights or thirty such incandescent lights. The said Alonzo F. Dexter, his successors and assigns, to furnish everything necessary and light and extinguish the lights, said lights to be kept burning all night except nights when the moon gives sufficient light to light the city.

Section 7. *Reservation of Rights by City.* That the city of Clay Center reserves the right to grant equal and like privileges to any other person or company during any or all the terms covered by this ordinance.

Section 8. *Rates Shall Not Exceed Those of Other Cities.* That the said A. F. Dexter, his successors and assigns shall at all times furnish light for the use of this city and the inhabitants thereof at as cheap a rate as electric light is furnished any city or the inhabitants thereof in the United States.

Section 9. *Term of Franchise.* That the rights

and privileges hereby granted are for a term of twenty-one years; provided, the said Alonzo F. Dexter, his successors and assigns, shall begin the erection of said electric light works within ninety days from the passage of this ordinance and shall complete the same and have the same in good working order within one year from the passage of this ordinance; and, provided further, that if at the expiration of twenty-one years the city shall refuse to grant a further continuance of these privileges the said city shall purchase said works at their appraised value, the same to be appraised by three disinterested electors of the state of Kansas, one of whom shall be chosen by the city, one by Alonzo F. Dexter, his successors and assigns, and the two so chosen shall select a third, and the amount agreed upon, upon their oath, by the three so chosen, shall be the price to be paid therefor; and provided further, that the city of Clay Center shall have the right to revoke the privileges herein granted at any time if the said Alonzo F. Dexter, his successors and assigns, shall fail to fully comply with all the provisions of this ordinance.

Section 10. This ordinance shall take effect and be in force from and after its passage, approval and publication once in The Dispatch.

Passed the council April 22, 1886.

Approved April 23, 1886.

WIRT W. WALTON, Mayor.

Attest: W. M. GROVE, City Clerk.

(SEAL)

Published April 29, 1886.

I, W. M. Grove, city clerk of the city of Clay Center, Kansas, hereby certify the above and foregoing to be a full and correct copy of ordinance No. 87 as the same appears enrolled and on file in my office.

W. M. GROVE, City Clerk.

To this second amended bill the city of Clay Center, its mayor and council, filed their demurrer which said demurrer was and is in language as follows.

In the Circuit Court of the United States in and for the District of Kansas, First Division.

IN EQUITY.

The Merrimack River Savings Bank, a Corporation, *Plaintiff.*

vs.

The City of Clay Center, Kansas, a Municipal Corporation; George W. Hanna, Mayor of said City; O. L. Slade, G. P. Randall, W. D. Vincent, L. Brightweser, E. D. Hartwell, and S. D. Tripp, composing the City Council of the said City, and the Clay Center Light & Power Company, a Corporation, *Defendants.*

DEMURRER ON THE PART OF THE DEFENDANTS, THE CITY OF CLAY CENTER, AND THE MAYOR AND COUNCILMEN OF THE CITY OF CLAY CCENTER, MENTIONED IN THE TITLE HEREIN TO THE SECOND AMENDED BILL OF COMPLAINT OF PLAINTIFF.

Come now the defendants, the city of Clay Center, Kansas; and George W. Hanna, mayor of said city; and O. L. Slade, G. P. Randall, W. D. Vincent, L. Brightweser, E. D. Hartwell, and, S. D. Tripp, members of the city council of said city, and not confessing all or any of the matters of the bill of complaint contained to be true as therein set forth and demur to said second amended bill of complaint filed by the plaintiff herein for the reason said amended bill does not state such a case nor contain such allegations of matters of equity as to entitle the complainant to any relief in equity against tnese defendants as prayed for.

Second: For the further reason that the said second amended bill of complaint shows upon its face that the franchise or ordinance set out therein under which complainant claims the right for the Clay Center Light & Power Company to maintain its poles and wires in and upon the streets of the city of Clay Center, Kansas, had expired by limitation long before this action was begun.

Third: For the further reason that said second amended bill of complaint considered by itself or in connection with the original bill and amended bill shows on its face that there is no federal question involved in this action and that no constitutional provision, law or treaty of the United States is called in question and that the second amended bill shows upon its face that it is not necessary to pass upon or construe any provision of the constitution of the United States or any statute of the United States or any treaty of the United States in the determination of any of the questions involved in said action.

That said second amended bill shows upon its face that the acts complained of as having been done or

threatened to be done by the defendants were not done or threatened to be done under any law of the state which impairs the obligation of any contract, nor by reason of any law, judgment or process of any court which deprives the plaintiff of any due process of law.

Wherefore these defendants pray the judgment of the court to determine whether they shall be compelled to further answer said complaint, amended complaint, or second amended complaint and also prays that this action be dismissed for want of jurisdiction at the costs of complainant.

F. B. DAWES and
R. C. MILLER,
Attorneys and Solicitors for Defendants.

Afterward the demurrer to the second amended bill came on to be heard before the court, John C. Pollock presiding, and after full consideration of the arguments of counsel on both sides the court sustained he demurrer on the ground that the bill of complaint did not show that the court had jurisdiction in the matter. Whereupon complainant filed its petition and application for an appeal to this court which petition for an appeal and assignment of errors on the part of complainant were and are in the words and figures following, to-wit:

In the Circuit Court of the United States for the District of Kansas, First Division.

The Merrimack River Savings Bank,
Complainant,

vs.

The City of Clay Center Kansas; George W. Hanna, Mayor of said City; and O. L. Slade, G. P. Randall, W. D. Vincent, L. Brightweser, E. D. Hartwell, and S. D. Tripp, the Mayor and City Council of said City of Clay Center; and, The Clay Center Light and Power Company, *Defendants.*

IN EQUITY.

PETITION FOR THE ALLOWANCE OF AN APPEAL AND COMPLAINANT'S ASSIGNMENT OF ERRORS.

The petition of the Merrimack River Savings Bank, the complainant in the above entitled cause, respectfully shows, that said complainant feeling aggrieved by the order, judgment and decree of this court entered in this cause on May 20, 1910, dismissing said complainant's second amended bill of complaint for want of jurisdiction, now prays an appeal from said order, judgment and decree to the supreme court of the United States, and,

Your petitiner for its assignment of errors upon which it will rely in the prosecution of said appeal respectfully says:

First: That said circuit court erred in holding and deciding that the acts alleged in said bill of complaint are insufficient to show that this is a case arising under the constitution of the United States, within the meaning of the act of congress conferring jurisdiction upon this court in such cases.

Second: That said circuit erred in rendering a decree sustaining the demurrer of the city of Clay Center and the individual defendants named in said bill of complaint.

Third: That said circuit court erred in holding and deciding that the pretended act of the legislature of the state of Kansas, designated in said bill of complaint as Ch. 121 of the session laws of 1905 does not authorize the municipal authorities of cities of the second class in the state of Kansas, and particularly the defendant city of Clay Center, to violate the terms and conditions of contract and franise entered into in April, 1886, between said city and one A. F. Dexter.

Fourth: That said circuit court erred in holding and deciding that the judgment of the supreme court of the state of Kansas in the case of the City of Clay Center et al. v. Clay Center Light and Power Company, referred to in said bill of complaint "neither authorized nor attempted to authorize the city or its officials to destroy or remove from the streets and alleys of the city any property in which complainant has an interest or to impair any right therein held by complainant by virtue of its mortgage or to take from complainant any property rights."

Fifth: That said circuit court erred in holding and deciding that the sole purpose of the statute of 1905,

hereinbefore referred to, was to place within the control of the city the power to prohibit the use of its streets and alleys and that said act was not intended to and did not grant to municipal corporations, such as the defendant city of Clay Center, the power to abrogate or impair any contracts theretofore made by such city.

Sixth: That said circuit court erred in holding and deciding that the acts and doings of the city officials of the city of Clay Center, defendants named in said bill of complaint which this complainant alleged they were threatening to do, were and would be, if accomplished, mere trespasses upon the property upon which the complainant held a valid first mortgage lien; and, that for such threatened injury to such property the complainant had no remedy cognizable in this court under the facts alleged in said bill.

Seventh: That said court erred in holding and deciding that as applied to the threatened acts of said city of Clay Center and itso fficials named in the bill, the decision of the supreme court of the state of Kansas, hereinbefore referred to, does not authorize a taking of the property of the complainant without due process of law; and, that said decision does not amount to an act of the state of Kansas abrogating and destroying property and contract rights of the complainant contrary to the provisions of the fourteenth amendment to the constitution of the United States.

Eighth: That said circuit court erred in holding and deciding that the statute enacted by the legislature of the state of Kansas, and hereinbefore referred to, does not, as applied to the facts alleged in said bill, amount to an impairment of the obligation of the contract of

April, 1886, between the defendant city of Clay Center and A. F. Dexter.

Ninth: That said circuit court erred in holding and deciding that it had no jurisdiction of the case made by the second amended bill of complaint.

Tenth: That said circuit court erred in refusing to decide whether or not said decision of the supreme court of Kansas, as applied to the facts alleged in said bill, d prived complainant of its property without due process of law contrary to the proisivons of the fourteenth amendment to the constitution of the United States.

Eleventh: Said circuit court erred in refusing to decide whether or not said pretended act of the legislature of the state of Kansas, enacted in 1905, impaired the obligation of the contract entered into in April, 1886, between the city of Clay Center and said Dexter.

Wherefore your petitioner prays that an appeal be granted to the end that your petitioner may have the said proceedings, orders, judgment and decree reviewed by the supreme court of the United States; and, that in the meanwhile and pending the determination of such appeal an order be entered in this case staying, suspending and superseding the operation of said orders, judgment and decree to the end that the status of the parties may be preserved until that time. And your petitioner here tenders to the court a good and sufficient bond in the sum of $—!— which it prays that this court approve and upon such approval the giving of said bond may act as a stay and supersedeas of said decree pending said appeal and until the further order of this court.

C. C. COLEMAN,
F. L. WILLIAMS,
D. R. HITE,
MULVANE & GAULT,
Solicitors for Complainant.

United States of America, District of Kansas, ss.

I, Geo. F. Sharitt, clerk of the circuit court of the United States of America, for the District of Kansas, do hereby certify the foregoing to be a true, full and correct copy of Petition for Allowance of Appeals and Assignment of Errors in the suit of The Merrimack River Savings Bank vs. City of Clay Center et al., Case No. 8767 in said court.

In testimony whereof, I have hereunto set my hand and affix the seal of said court at my office in Topeka, in said District of Kansas, this 15th day of August, A. D. 1910.

GEO. F. SHARITT, Clerk.

(SEAL)

In the Circuit Court of the United States, District of Kansas, First Division.

The Merrimack River Savings Bank,
Complainant,

vs.

The City of Clay Center, George W. Hanna, Mayor of said city; and O. L. Slade, G. P. Randall, W. D. Vincent, L. Brightweser, E. D. Hartwell and S. D. Tripp, the Mayor and City Council of said City of Clay Center, and The Clay Center Light & Power Company,
Defendants.

The court after full consideration of the petition for an appeal and assignment of errors on the part of complainant, made an order allowing said appeal to

this court, and thereupon said court caused a journal entry of decree to be entered on the journal of said court sustaining the demurrer of the defendant, the city of Clay Center, its mayor and councilmen, dismissing the bill, amended bill and second amended bill for want of jurisdiction in said court to try the issues in said case and also allowing an appeal to this court which said journal entry and decree was and is in the following language, to-wit:

DECREE.

And now on this May 20th, 1910, this cause came on for final decree on the demurrer of the defendant city of Clay Center and the individual defendants above named to the second amended bill of complaint of the above named complainant; and, thereupon the court having considered the arguments of counsel and being fully advised in the premises finds that the allegations of said second amended bill of complaint are insufficient to confer jurisdiction on this court.

Now, therefore, It is by the court now here ordered, adjudged and decreed that said demurrer be and the same hereby is sustained on the ground that the facts alleged in said second amended bill of complaint are insufficient to confer jurisdiction on this court; and

It is further ordered, adjudged and decreed that said second amended bill of complaint herein as well as the original and amended bills of complaint are hereby dismissed for want of jurisdiction; and,

It is further ordered that pending the appeal this day allowed to the supreme court of the United States and until the determination thereof and the further orders of this court, the injunction heretofore issued in this cause be and the same hereby is continued in full

force and effect, the said complainant having filed its bond as required by the order of this court allowing said appeal.

JOHN C. POLLOCK,
Judge.

Endorsed: No. 8767. Merrimack River Savings Bank vs. City of Clay Center et al. Decree filed May 20, 1910.—Geo. F. Sharitt, Clerk.

United States of America, District of Kansas, ss:

I, Geo. F. Sharitt, clerk of Circuit Court of the United States of America, for the District of Kansas, do hereby certify the foregoing to be a true, full and correct copy of Decree in the suit of Merrimack River Savings Bank vs. City of Clay Center, et al., Case No. 8767 in said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Topeka, in said District of Kansas, this 10th day of August, A. D. 1910.—Geo. F. Sharitt, Clerk.

The above and foregoing statement of facts, contains a full and complete history of the case, full and complete copies of the Bill of Complaint and Demurrer thereto, Amended Bill of Complaint and Demurrer thereto, Second Amended Bill of Complaint and Demurrer thereto, the same being all the pleadings in the case, true and correct copies of the journal entry of the decree of the court dismissing the bills of complaint and allowing appeal to this court, also full and complete copy of the opinion of the supreme court of Kansas, referred to in the Second Amended Bill of

Complaint, a copy of the law of Kansas of 1905, referred to in Second Amended Bill, a true and correct copy of complainant's application for allowance of appeal and its assignment of errors, and all things necessary for the court to have in passing upon the question involved in this appeal.

For the accommodation of the court the above contains the whole of the record, as well as an abstract of the history of the case.

Brief and Argument

This is an appeal from the circuit court of the United States for the District of Kansas. The circuit court dismissed the bill, amended bill and second amended bill upon hearing on demurrer by the defendants for the sole reason that the circuit court was without jurisdiction to hear the case. Upon that final decree dismissing for want of jurisdiction, the complainant appealed to this court.

The appellee, the city of Clay Center, files its motion in this court under rule 32 and section 4 of rule 6 of this court. The defendant in the court below demurred to the bill of complaint originally filed and one of the grounds of such demurrer was that the bill of complaint showed upon its face that one of the defendants, the Clay Center Light & Power Company, and the city of Clay Center, Kansas, and all other defendants, were citizens of the state of Kansas, and that, therefore, there was not that diversity of citizenship which would give the circuit court jurisdiction because the Clay Center Light and Power Company should be aligned on the side of the complainant. It thus appears that there was a question in the court below involving the jurisdiction of the court and the appeal to this court would be under the act of February 25th, 1889, referred to in rule 32 of this court. The same allegations of citizenship appear in the amended

bill and also in the second amended bill. In the amended bill and second amended bill there is an attempt to allege facts showing that the case is one arising under the constitution and laws of the United States. To each of these bills of complaint the defendant, the city of Clay Center, demurred for the reason that there was no federal question involved in the action, that it did not arise under the constitution or laws of the United States and that no constitution provision, law or treaty of the United States or the construction of either was necessary in passing upon such case and generally for the reason that the bill did not show jurisdiction in the circuit court.

This, therefore, is a case in which the jurisdiction of the court below was in issue and the sole question certified to this court for its decision is the question of jurisdiction and is, therefore, a case in which the appeal can be said to be under section 5, chapter 517 of the act of congress of March 3rd, 1891, and clearly within rule 32 of this court.

As above stated, in the original bill of complaint the only ground for jurisdiction alleged was diversity of citizenship. The question then is, what was and is the controversy in this case? The complainant is a citizen of New Hampshire. If it is the only party on its side of the controversy and living outside the state of Kansas, and all the other parties who are citizens of Kansas are on the opposite side of the controversy, then, of course, the court below had jurisdiction. If, however, on a proper re-alignment of the parties it

should appear that the complainant, the Merrimack River Savings Bank, and the Clay Center Light & Power Company are on the same side of the controversy and the city of Clay Center and the mayor and council on the other side of the controversy, we would then have citizens of the same state on opposite sides of the controversy and the court would not have jurisdiction.

The sole controversy in the case is as to the right of the Clay Center Light & Power Company to maintain its poles and wires upon the streets, alleys and public grounds of the city of Clay Center, perpetually. In the original bill, amended bill and second amended bill, it is alleged "that said Clay Center Light & Power Company ever since it took possession of said plant and property has recognized the lien of your orator and no controversy exists between your orator and said Light & Power Company with reference to your orator's said lien. That ever since it took possession of said property said Clay Center Light & Power Company has been and is now engaged in the business of distributing electric light and power to citizens and inhabitants of the city of Clay Center, etc. In the bills of complaint it is further alleged that "said city of Clay Center and the individual defendants herein are officers of said city acting under and by virtue of the powers conferred upon it by said statute of 1905, relative to the control by said city of the use of its streets and public grounds and acting under the decision of said supreme court relative to said ordinance of 1886,

threatened to and will unless restrained by the order of this court, tear down, remove and utterly destroy the poles, wires and other equipment now and for some time before the beginning of this suit employed by said Light & Power Company, defendant herein, for the distribution of electric light and power to the citizens and inhabitants of the city of Clay Center." In all of the bills the allegation is that the defendants threatened to interfere with and remove the property of the Clay Center Light & Power Company from the streets of the city. The complainant then prayed for a final decree "adjudging that the ordinance of April 22nd, 1886, duly conferred upon the said Light & Power Company as assignee and grantee by mesne conveyance from the said Dexter, the right to occupy the streets and alleys of Clay Center for the purpose of carrying on its business of distributing electric light and power to the inhabitants of the said city without interferance on the part of the said city of Clay Center until and unless said city of Clay Center shall duly perform the obligations imposed upon it by the terms of said ordinance and that the final decree of this court make the said injunction hereinbefore issued and served upon said city of Clay Center and said individual defendants perpetual."

It will, therefore, be seen that the interests of the complainant and the defendant, the Clay Center Light & Power Company are identical. Complainant alleges that there is no controversy between it and the Light & Power Company. Under the allegation the sole con-

troversy is as to the right of the Light & Power Company to maintain its poles and wires on the streets and alleys of Clay Center. Complainant and the defendant, Light & Power Company, are on the side of the controversy which says the Light & Power Company has such right, and the city of Clay Center, its mayor and council, are on the other side of the controversy, saying that it has no such right. It is plain to be seen, therefore, that the complainant and the Light & Power Company should be aligned as complainants on one side of the controversy, and the city of Clay Center and its mayor and council on the other side of the controversy. When this is done we find the Light & Power Compnay, a citizen of Kansas, on one side of the controversy and the city of Clay Center and its mayor and councilmen, all citizens of the state of Kansas, on the other side of the controversy. This being the case under all of the decisions of this court bearing upon the question the court below had no jurisdiction on the grounds of diversity of citizenship.

We do not deem it necessary to consume much time of the court in an attempt to show the lack of jurisdiction on the ground of diversity of citizenship, because ever since the decision of this court in the removal cases reported in 100 U. S. there has practically been no dispute upon this question. We will, however, call the attention of this court to some of the authorities bearing upon this question.

Black's Dillon on Removal, Chap. 8, Sec. 90, lays down the rule as follows:

"In determining the question of its jurisdiction over a cause brought to it by removal from a state court below had no jurisdiction on the grounds of di- the record, as plaintiffs or defendants, which the pleader has chosen to assign to the various parties joined in the litigation; but it may and will ascertain what is the matter in dispute, and then arrange the parties on opposite sides of this dispute, according to the facts, and according as their interests really lie with one side or the other and if, upon such an arrangement, it appears that all the parties on one side of the controversy are citizeens of different states from all the parties on the other side, the federal court may take jurisdiction of the cause. Parties to a suit cannot artificially arrange themselves so as to either create a fictitious ground of federal jurisdiction or defeat a right of removal. The court will look to the real facts of the case as shown by the pleadings and arrange the parties accordingly."

We will next call the court's attention to section 133 of Moon on Removal of Causes. Said section reads as follows:

"When it so happens that the interests of the parties in a litigation is different from their nominal position as plaintiffs or defendants, they will be arranged according to their actual interests in the controversy in determining the removability of a suit. All of the parties interested in maintaining one side of the controversy will be placed on one side and those opposed to them, on the other. As thus arranged the citizenship of all the plaintiffs in interest must be diverse from all of the defendants' interests."

We desire to call the attention of the court to Car-

ter on Jurisdiction of Federal Courts, at page 142. The author lays down the doctrine as follows:

"For the purposes of jurisdiction, the court has power to ascertain the real matter in dispute and arrange the parties on one side or the other of that dispute. If in such an arrangement it appeared that those on one side were all citizens of different states from those on the other, jurisdiction might be entertained and the case proceeded with. That rule, we think, applied as well to the first section as to the second. The rule is now universally applied."

Carter on Jurisdiction of Federal Courts. Page 142.

We now desire to call the attention of the court to volume 1, section 18, of the third edition of Foster's Federal Practice, at page 64. It reads as follows:

"In determining between whom the controversy exists, the court is not bound by the title of the cause, or the form of the pleadings, but should examine the record, ascertain the matter in dispute, and arrange the parties on opposite sides of the same according to the facts, no matter what their technical place as plaintiffs or defendants may be. In a suit by taxpayers against county officers and bondholders to enjoin payment of the bonds, the defendant officers are presumed to take the same side of the controversy as the taxpayers. It has been held that, in a suit by a bondholder to enforce a right after his trustee has refused to sue upon the same, the defendant trustee is upon the same side of the controversy as the plaintiff, unless the latter seeks some relief antagonistic to the other beneficiaries of the

trust, or perhaps when he claims some substantial relief against the trustee. Where, upon the foreclosure of a second mortgage, the plaintiff claimed that the first mortgage had been paid, and the mortgagee, who was a defendant to that foreclosure, filed a cross-bill to foreclose his prior mortgage, it was held that in the controversy upon such cross-bill the mortgagor and the second mortgagee, who was the original plaintiff, were on the same side and opposed to the cross-complainant.

"In a suit by a mortgagee to protect the mortgaged property a defendant mortgagor is upon the plaintiff's side of the controversy, unless affirmative relief is sought against him."

Foster's Federal Practice, 3 *ed.*, *Vol.* 1, *Sec.* 18, *p.* 64.

In this connection it would only be fair to the court below to quote that portion of its opinion bearing upon the matter in this case. The court re-aligned the parties and placed the defendant,, the Clay Center Light & & Power Company on the plaintiff's side of the controversy beacuse its interests were there, held that it was a necessary party and this being the case, citizens of the state of Kansas appearing on both sides of the controversy that it had no jurisdiction on the ground of diversity of citizenship. The court said:

"The property threatened by defendant officials of the city, acting for the city, to be destroyed or removed from the streets of the city, is the property of the power company in its possession and being used by it, in which

the complainant has only the interest of a lienor. It must, therefore, be assumed the power company has as much or more interest in its protection and conservation than has complainant, and that it will be as much or more benefited by a decree in favor of complainant than will complainant itself. Therefore, it must be true in a proper arrangement of the parties according to interest in the subject matter of the controversy, the power company must be aligned with the complainant, and thus aligned this court has no jurisdiction of the controversy on the ground of diverse citizenship of the parties, unless complainant, bringing on this controversy and making the power company a party thereto on the record may now be heard to contend, as is argued in its brief, that the power company is not a necessary party to its bill of complaint, and therefore, the case may be proceeded with and determined by final decree as though the power company were not present. That the power company, the owner in possession and using the property sought by complainant to be protected by the decree prayed in its bill, is interested in the subject matter of the suit, is apparent beyond dispute. If decree shall be entered against complainant in this suit based on rights asserted to have been granted by the city to the grantor of both complainant and the power company, it is clear such decree would also, to the extent of such rights as are common to both, bind the power company, a party, and would not bind it if not a party to the controversy. Therefore, if the power company had not been made a party to the suit, or, if being a party before decree it shall be dismissed therefrom, its rights undetermined, that it will be at liberty to bring and prosecute its suit to obtain the exact character of relief sought by complainant in the protection of its individual rights in the property, must be conceded. It is, therefore, a necessary party to this suit.

Consolidated Water Co. v. Babcock, 76 Fed. 243; Boston Safe Deposit & Trust Co. v. City of Racine et al., 97 Fed. 817; Old Colony Trust Co. v. Atlanta Ry. Co. et al., 100 Fed. 789; Burnham v. Kempton, 37 N. H. 485; Story's Eq. Pl., Chap. 4, Sec. 72 and 76 a.

"In Burnham v. Kempton *supra, it* is said:

" 'The rule is, that all persons materially interested in the subject ought generally, either as plaintiffs or defendants, to be made parties to the suit, or to be served with a copy of the bill." 1 Dan. Ch. Pr. 240. It is necessary that the plaintiff should bring regularly before the court either as co-plaintiffs with himself, or as defendants, all persons so circumstanced, that, unless their rights were bound by the decree of the court, they might cause future molestation or inconvenience to the party against whom the relief is sought; Ibid. 241; or, as it is better expressed in the margin, "All having a right to sue the party for the same thing." Story's Eq. P; 74, 136, &c; 2 Swift's sys. 248; Adams Eq. Jur. 418, sec. 537.

"It follows, the power company, being a necessary party to the suit, united in interest with and not against complainant by the averments of the amended bill, and GAL TWENTY

being a necesary party to complete determination of the rights of the parties interested in the subject matter of this suit, to the end, that further litigation may case, it must be held this court cannot take jurisdiction of this cause on the ground of diversity of citizenship of the parties."

From Opinion of Judge Pollock in court below.

We will call the attention of the court to one more case because it is on all fours with the case at bar. In this case, however, the mortgagee brought suit against the city of San Diego alone and the court held that the San Diego Water Company which had executed the mortgage was a necessary party and dismissed the case for want of jurisdiction because, as the court said, if this necessary party were brought in and the parties properly aligned, it would divest the court of jurisdiction because there would be citizens of California on both sides of the question. In passing upon the question among other things the court said:

"Thus, it will be seen that the end aimed at by the bill, what ever may be the purpose of or resulting benefit to the complainant, is the protection of the property and franchises of the San Diego Water Company and the San Diego Flume Company, and that the interests of these two companies, so far as the present suit is concerned, are identical with and inseparable from the interests of complainant. It would be impossible for the court to reach any judgment determinative of complainant's rights without passing upon the rights of said companies. Therefore, in order to bind them, and thus avoid a multiplicity of suits, equity deems them necessary parties to the litigation."

In this same case just quoted from the attorneys for the complainants in an attempt to avoid the conclusion of the court that the mortgagor was a necessary party insisted that there was no foundation for such claims because the action was brought to protect the

security of complainant and not the property of the water company. The court disposed of this argument as follows:

"The infirmity of this reasoning lies in the fact that it makes the purpose of the complainant, rather than the subject matter of the relief asked for in the bill, the rule of determining who are necessary parties. Conceding that the object—that is the purpose—of the complainant in bringing the suit as stated in the above quotation from complainant's brief, is the protection of its security, yet, unavoidably and manifestly the court, in reaching a decree, must pass upon the rights of the water company."

Consolidated Water Co. v. Babcock et al., 76 *Fed.* 243-252.

On the question of the Clay Center Light & Power Company being a necessary party, we cite the following decisions of this court:

Shields v. Barrel 17 *Howard* 130

Gregory v. Stetson 133 *U. S.* 579.

That there is no diversity of citizenship when the parties are properly arranged see:

Pacific Railroad Co. v. Ketchum U. S. Law Ed. 25, 936.

Moyer v. Railway, U. S. Law Ed. 25, 958.

Shipp v. Williams 10 *C. C. A.* 247-259.

From the authorities above quoted we submit to the court that there was but one thing for the ocurt to do and that was to sustain the demurrer on the part of the city of Clay Center and dismiss all the bills of the complainant on the ground that it had no jurisdiction on the grounds of diversity of citizenship.

II.

IS THIS A CASE ARISING UNDER THE CONSTITUTION OR LAWS OF THE UNITED STATES?

As above stated after the filing of the demurrer to the original bill defendant applied for and was granted leave to file an amended bill of complaint. In this amended bill there was an attempt on the part of the complainant to found jurisdiction upon the ground that the suit was one arising under the constitution and laws of the United States. When this amended bill was filed a copy of which is printed herein, the defendant, the city of Clay Center, demurred. One of the grounds of such demurrer was that the case was not one arising under the constitution or laws of the United States and that, therefore, the court had no jurisdiction. The main argument in the case in the court below was upon this amended bill and the demurrer thereto. After the court had rendered its opinion sustaining the demurrer and ordering the bill dismissed unless an amendment was filed on or before rule day in March, 1910, as stated above, the complainant filed a second amended bill of complaint. We will first discuss the amended bill of

complaint and afterward the second amended bill. In order to bring again directly before the court the matters and things alleged in the amended bill in the attempt to found jurisdiction on the ground that the case was one arising under the constitution of the United States we will set up all of the allegations of the amended bill which have a tendency in the direction of showing that fact. In paragraph 4 of the amended bill we find the following allegations, to-wit:

"That, on or about April 22, 1907, at the expiration of the period mentioned in said original contract between the city of Clay Center and said Dexter, the defendant city, acting by and through the individual defendants named herein, at a regular session of the city council of such city attempted to repudiate and annul said contract so made as aforesaid with said Dexter; and, without any notice to your orator attempted to, by pretended corporate action of said city, annul and destroy any and all rights of your orator, as the holder of a lien upon said property connected with said electric light plant; and, without notice to your orator took some action with the details of which your orator is unacquainted, resulting in a denial by said city of any liability whatsoever growing out of said contract so entered into with the said Dexter and refused to recognize the terms of the same. Your orator further avers that, influenced so to do by the determination to violate and impair the obligation of said contract of April 22, 1886, the said city of Clay Center and the said individual defendants, pretending to act officially in the premises, threatened to destroy said electric light plant by tearing down the poles and wires and other electric equipment connected therewith, and to destroy and im-

pair the business of said electric light plant by the physiscal destruction of the means employed thereby in the furnishing of electrical power and light to the inhabitants of said city of Clay Center; that said individual defendants, pretending to act as members of the council of said city, and said city have threatened to and will, if not restrained by orders of this court, forcibly remove from the streets and alleys of said city all of the electric equipment including posts and wires belonging to and forming a part of the electric light plant, which, as aforesaid, was conveyed unto your orator as security for the payment of said bond so executed by the said Williamsn to the said investment company, and, the said individual defendants and said city threaten to and will, unless restrained by the orders of this court, break up and destroy said poles, wires and other equipment connected with said electric light plant and prevent it from carrying out its contracts with a large number of inhabitants of the city of Clay Center with whom it has business connections, and thereby the security of your orator for the payment of said bond will be inevitably destroyed to the irreparable injury of your orator in that behalf."

Before we leave paragraph four of the bill above set out, we desire to say a few words in connection with the same. Boiled down, these allegations are that at the expiration of the period mentioned in the Dexter franchise or ordinance the mayor and the council at a regular session attempted to repudiate said contract. That they attempted to, by pretended corporate action, annul and destroy the rights of your orator, as a lienholder upon said property. That at said council meeting they took some kind of action with the details of

which your orator was not acquainted, which resulted in a denial by the city of any liability whatsoever growing out of said contract with the said Dexter and refused to recognize the terms of the same. That they were influenced to do these things by a determination to violate and impair the obligation of said contract of April 22, 1886.

Then follows that after they took this unknown action or pretended action a charge that the mayor and council threatened to destroy said electric light plant by tearing down the poles and wires and other electric equipment connected therewith.

Now, the constitutional inhibition concerning the impairment of the obligation of a contract is directed against the states and the states only. It provides that no state shall pass any law impairing the obligation of a contract. Among the above allegations, you will find no allegation that what the council did was under, by virtue of or in pursuance of any law of the state of Kansas, passed subsequent to April 22nd, 1886, the time the Dexter franchise was passed and the Dexter contract entered into. It amounts simply to a charge that the mayor and council as individuals and without authority of the state of Kansas, its legislature or any of its courts, took certain unknown steps to nullify the contract; to deny the liability of the city and made certain threats to remove the poles and wires of the light company from the streets of the city. *Such allegations are not sufficient to raise any federal question or give*

a federal court jurisdiction.

The next place we find any allegation in the amended bill which could be claimed as an attempt to raise a federal question is in paragraph five. Inthis paragraph, after alleging that the property upon which complainant claims a lien was subsequently transferred to the Clay Center Light & Power Company, and that said company is now the owner of the same, as the successors of A. F. Dexter and his assigns, and that its ownership and title are subject and junior to complainant's mortgage and after further alleging that said light and power company has at all times recognized the lien of complainant, *and that no controversy exists between your orator and said Light and Power Company with reference to your orator's lien, said* paragraph then is in the words and figures following:

"But your orator avers that notwithstanding the rights of your orator in that behalf the said city of Clay Center and the above named individual defendants, consisting of its mayor and city council, have threatened to and will, unless restrained by the authority of this court, interfere with the use, occupation and ownership of said electric light plant, its business and equipment, by cutting down and otherwise destroying the poles, wires and other electric equipment pertaining to said plant for the express and avowed purpose of preventing said Light and Power Company from carrying on the business of furnishing *to the inhabitants of said city electric power and light; and your orator avers that the said city of Clay Center and city council of said city, have no power, right or authority to so arbi-*

trarily destroy the property and business of said Light and Power Company and so, as aforesaid, to impair annd destroy the security upon which your orator must depend for the ultimate satisfaction of said bond and the recovery by your orator of said sum of $15,000.00, so, as aforesaid, expended upon the faith and credit of said bond and said lien; and your orator avers that neither said *City of Clay Center, nor said individual defendants, have any lawful right, power or authority to so deal with the property upon which your orator has said lien*, and that the result of such action, if permitted to be carried out, would impair and probably destroy the security of your orator afforded by its said lien."

We submit to your honors that the above allegations present no federal questions, and, therefore, do not confer upon a federal court jurisdiction regardless of diversity of citizenship. After alleging that the mayor and council have threatened to and unless restrained, will interfere with the use, occupation and ownership of said electric light plant by cutting down its poles with the express and avowed purpose of preventing said Electric Light and Power Company from carrying on its business,, there is a flat-footed allegation "that the said city of Clay Center and the individual defendants pretending to act as mayor and city council of said city have no power, right or authority to destroy the property or business of said electric light company, or to impair and destroy the security of the complainant."

There is another allegation that "neither said city

of Clay Center nor said individual defendants have any lawful right, power or authority to so deal with the property upon which your orator has its lien and that the result of such action if permitted to be carried out would impair and probably destroy the security of your orator afforded by its lien."

These allegations amount to nothing more than that the mayor and councilmen of the city without regard to law, without any authority from the state, and in violation of law threatened to destroy certain property. In other words, they allege that the individual members of the council as private trespassers will break the law and destroy property. This raises no federal question.

In paragraph six of the amended complaint, we find that complainant alleged that about the date of the expiration of the time mentioned in the Dexter franchise for which it was to run, the defendant Light & Power company commenced an action in the district court of Clay county to specifically enforce the provisions of the Dexter contract. It alleges that the district court decided in favor of the Light & Power Company. That the case was taken to the supreme court of the state of Kansas, and that the decision of the district court was reversed and that a mandate of the supreme court of Kansas, duly issued, directing the said district court of Clay county

"To enter a judgment in favor of said city to the effect that said contract of April 22nd, 1886, in so far

as it granted unto the said Dexter any additional time beyond the specific time mentioned therein was utterly void and not binding upon said city."

Right here, let us say that the above allegation is absolutely true. The supreme court did hold such contract to be beyond the power of cities of the second class, and that said contract was *ultra vires* null and void and that the city was in no way bound thereby. *Under numerous decisions of this court this construction of the contract and of the law under which the franchise was granted is absolutely binding, not only upon the circuit court—but every federal court including the supreme court of the United States.*

Inasmuch as there is an attempt in the latter part of paragraph six to set up a judgment of the supreme court of Kansas as an adjudication or act depriving complainant of its property or security without due process of law and as being a denial of the equal protection of the law to it as a corporation transacting business in Kansas, we will proceed to set up such allegations contained in paragraph six. They are as follows:

"Your orator avers that it was not a party to the proceeding in the supreme court of Kansas wherein and whereby such a judgment and decision was rendered: that said judgment and decision of said supreme court denied unto your orator the equal protection of the laws, if such judgment and decision of said supreme court so destroying and annulling said contract is permitted to have the effect now claimed for such decision by said

city and said individual defendants therein; by virtue of the action of said Kansas supreme court, your orator will be deprived of its property rights in, about and concerning said electric light plant without due process of law in this—that your orator had no opportunity to be heard nor has your orator had any notice of a hearing in respect of your orator's rights growing out of the execution of said bond and the transfer of the same unto your orator and the existence of said first mortgage lien.

"Your orator further avers that said contract of April 22, 1886, is not void in respect to any of its terms, that the decision and judgment of the supreme court of Kansas in that respect is a denial of the equal protection of the laws to persons and corporations duly transacting their business in the state of Kansas; that said decision and judgment of said supreme court impaired the obligation of the contract originally made by the said city of Clay Center with the said Dexter, and, that to now permit said city of Clay Center and said individual defendants to destroy the property upon which your orator must depend for the satisfaction of its claim growing out of the execution to your orator of said bond and said mortgage upon the mandate of said supreme court of Kansas in a cause where your orator had no opportunity to be heard would be to deprive your orator of his property without due process of law and contrary to the constitution of the United States and particularly to the fourteenth amendment of such constitution."

Let us call the attention of the court to the facts that in the allegations last above set out there is no statement of facts or showing made that the decision or

judgment of the supreme court of Kansas in any way impaired the obligation of a contract or that it deprived the complainant of any of its property without due process of law or that it would tend to deny to the complainant the equal protection of the law. Even if a judgment of the court of last resort in the state could be held to be an act of the state impairing the obligation of a contract, there is no allegation that this decision of the supreme court of Kansas had any such tendency. The allegation is that it would have such a tendency "IF such judgment and decision of said supreme court destroying and annulling said contract is permitted to have the effect now claimed for such decision by said city," etc. You see the whole allegation is based upon the well known sign of doubt *if*. There is no allegation or showing that such decision impairs the obligation of any contract or deprives anybody of property without due process of law or denies any person the equal protection of the law, but the allegation is that such decision would do this IF the interpretation put upon it by some concilman of the city of Clay Center is correct. It cannot be said that such a decision can be classed as a law of the state impairing the obligation of a contract for the reason that the misinterpretation of a law of the state by some of its officers cannot be held to be the act of the state itself.

Such judgment of the court cannot be held to be an act of the state impairing the obligation of a contract for the further reason that the law interpreted in such decision by the supreme court was section 7 of chapter

99 of the session laws of Kansas of 1885, which was in full force and effect thirteen months before the franchise granted to Dexter and assigned to the complainant was passed by the city council of Clay Center. It is only a law passed subsequent to the entering into a contract that can impair the obligation of such contract. Even in the absence of paragraph seven of the amended bill there is nothing contained in paragraph six to give a federal court jurisdiction, because the whole of the allegation concerning due process of law, the impairing of the obligation of a contract and denying equal protection of the law is only claimed in said bill to have such effect IF it is to be interpreted the way the mayor and council interpret it.

In paragraph seven of the amended bill complainant proceeds to plead itself entirely out of court so far as the judgment of the supreme court of Kansas depriving it of any right is concerned. In paragraph seven the bill alleges that there is nothing in the decision of the supreme court which justifies the threatened action of the mayor and council of the city of Clay Center. In other words the bill alleges in substance that all the acts alleged that the mayor and council are threatening to do, are in violation of the decision of the supreme court of Kansas and that the pretense on the part of the mayor and council that such decision justifies such threatened act *is a mere sham.*

Paragraph seven of the amended complaint is as follows:

"Your orator further avers that while it is sometimes pretended by said city of Clay Center and by said individual defendants that they are authorized so to do, by said decision of said supreme court, your orator avers *that such pretense is a mere sham; that nothing in the decision of said supreme court justifies the destruction of the property upon which your orator has its lien as aforesaid;* but your avers that if said pretense is justified by such decision then your orator avers that by and through such instrumentality the state of Kansas is depriving your orator of its property without due process of law; and, that if said individual defendants and said city are justified by said decision of said supreme court in destroying said property by tearing down said poles, destroying the business connections of said electric light plant and otherwise interfering with the conduct of said business as a going concern, that then and in that event by such instrumentality the said state of Kansas is depriving your orator of its security, and unless such action on the part of said city of said officials, individual defendants herein, is restrained by the authority of this court, your orator will have been deprived of the security mentioned and described in said indenture of mortgage without having its day in court."

The allegation that the pretense of the city in acting under and by virtue of such judgment is a mere sham and that such judgment gives the mayor and council and the city no authority to commit the threatened act absolutely shows that even though such judgment had been rendered upon a law passed subsequently to the entering into of the contract with Dexter that such judgment did not impair the obligations of such contract and did not give the mayor and council any right

to commit the threatened acts and therefore if the mayor and council should do the things which it is alleged in the bill they will do, they would not be acting under or in pursuance of any law or any judgment of the court, but would be acting in their private capacities as mere trespassers, and this court would have no jurisdiction. The above and foregoing parts and parcels of the amended bill are all the allegations in said bill which attempt to give the circuit court jurisdiction because of a federal question being involved.

It was upon the above and foregoing allegations of the amended bill that the court below was passing when it rendered its opinion, hereinbefore cited and quoted from. After the court rendered its opinion and held that there appeared to be no law of the state of Kansas referred to or set up in the bill, passed subsequently to the entering into the contract with Dexter, his successors and assigns, which impaired or tended to impair the obligation of said contract and also that there was nothing in the judgment of the supreme court of Kansas authorizing the city or its officers to commit the threatened act or which tended to deprive the complainant of due process of law or to deny to complainant the equal protection of the law, and ordered the bills dismissed unless a second amended bill should be filed which on its face would give the court jurisdiction, it was then that the complainant filed its second amended bill and for the first time in the history of the case attempted to set up a law passed by the legislature of the state of Kansas subsequent to the entering into the con-

tract with Dexter and assigns which it claims impaired the obligation of such contract.

The new matter set out in the second amended bill is as follows:

"That in 1905 the state of Kansas passed a law known as chapter 121, laws of 1905, which among other things provides as follows:

"Section 1. The streets, alleys, public parks and grounds in cities of the second and third classes in the state of Kansas shall be under the control of the mayor and councilmen of the municipalities thereof and the jurisdiction over and the control thereof is vested in said cities.

"Section 2. Before any person, firm or corporation shall have the right to enter upon the streets, alleys, public parks and grounds of any city of the second or third class in the state of Kansas for the purpose of piping the same for gas, heat, light, water, or for the construction of any railways, street railways, sewerage system, telephones or for any other purpose whatsoever, such person, firm or corporation must first procure the passage of an ordinance by the mayor and councilmen of such city granting such person, firm or corporation such right or rights and in which said ordinance shall be defined fully and at length the terms upon which said right is conceded.

"Section 3. Any person, firm, or corporation, their agents, servants or employes, who shall without first having obtained by ordinance from such municipal authorities as hereinbefore provided, authority so to do,

enter upon any of the streets, alleys, public parks or grounds of such cities and interfere with the surface thereof, or dig ditches, or obstruct the same in any way, or otherwise interfere therewith, shall be guilty of a misdemeanor for each day this act shall be thus violated, and upon conviction thereof shall be fined in any sum not exceeding one hundred dollars for each offense;

"That by said act of 1905 the state of Kansas placed the entire control of the use of the streets of said city in the hands of its officers, to-wit, its mayor and council; and, authorized said city to withhold its consent to the use of its streets and alleys upon any pretext and for any or no reason.

"That in pursuance of such power and authority so granted, the said city by its mayor and council in October, 1906, duly passed a resolution declaring that said city would not consent to the said Light & Power Company's use of said streets and alleys beyond the expiration of 21 years from April 22, 1886, and duly notified said company of said resolution; and, in March, 1907, the said city duly adopted an ordinance in terms repealing said ordinance and contract of April 22, 1886.

* * * * * * *

"Your orator avers that under said ordinance of April 22, 1886, and by virtue of the conveyances aforesaid, the said Light and Power Company has a lawful right to occupy said streets and alleys in the manner aforesaid but said city of Clay Center and the individual defendants herein, as officers of said city, acting under and by virtue of the powers conferred upon them by said statute of 1905, relative to the control by said city of the use of its streets and public grounds and acting under the decision of said supreme court relative

to said ordinance of 1886, threaten to and will, unless restrained by the order of this court, tear down, remove and utterly destroy the poles, wires and other equipment now and for some time before the beginning of this suit employed by said Light and Power Company, defendant herein, for the distribution of electric light and power to the citizens and inhabitants of the said city of Clay Center; that said city and said individual defendants, as officers thereof, are authorized and have the right so to tear down, remove and destroy the property of said Light & Power Company so employed and to institute criminal proceedings against said company and its officers and employes for continuing to use said streets and alleys for said purposes by virtue of the authority conferred upon cities of the second class by said act of 1905, and by said decision of the supreme court; that said city of Clay Center and said individual defendants have demanded of the said Light and Power Company that it forthwith remove said posts and wires from the streets and public grounds of the city, and thereby compel the said Light and Power Company to discontinue its said business of distributing electric light and power by means of said posts and wires to the citizens and inhabitants of said city; that said poles and wires are a part and parcel of, and connected with, said electric power plant owned and used by said Light and Power Company, and constitute the only available means by which said Light and Power Company can distribute to the citizen and inhabitants of the city electric light and power and carry on the business for which it was incorporated and for which its property is adapted; that if said poles and wires are torn down, removed and destroyed by said city and said individual defendants, acting as officers thereof, the business and property of said Light and Power Company will be utterly destroyed and become wholly useless and thereby the

security of your orator for the payments of its debt will be greatly repaired, if not made wholly worthless; that said city of Clay Center and said individual defendants unless restrained by this court, threaten to, and will by force and violence remove said poles and wires from said streets and alleys, and resort to criminal process against said Light and Power Company and its servants and otherwise interfere with and damage the business of said company with the resulting effect of impairing and destroying the aforesaid security of your orator.

"Your orator avers that the statute enacted by the legislature of the state of Kansas in 1905, and hereinbefore referred to, impairs the obligation of the contract entered into by said city of Clay Center and said Dexter in 1880 under which your orator is bound to and does claim security for the payment of its debt, and, therefore, your orator avers that said act of the legislature of the state of Kansas, enacted in 1905, and hereinbefore referred to, violates that provision of the constitution of the United States prohibiting any state from passing any law impairing the obligation of contracts; and your orator further avers that the decision of the supreme court of Kansas, holding and deciding that said city of Clay Center had no power or authority to grant unto the said Dexter and his assigns, the use of said streets and alleys for the erection thereon of poles to carry wires to distribute electric light and power to the citizens and inhabitants of said city for a longer period than twenty-one years, impairs the obligations assumed by said city under said contract and denies unto your orator the equal protection of the laws in violation of the constitution of the United States, and said threatened acts of said city of Clay Center and of the individual defendants, as officers of said city authorized by

statute and decision, to-wit: the tearing down, removing and destroying said poles and wires and thereby making worthless the property upon which your orator depends for the payment of its debt will deprive your orator of its property without due process of law and in violation of the fourteenth amendment of the constitution of the United States providing that no person shall be deprived of his property without due process of law."

Having thus fully set out the allegations of the bills of complaint for the convenience of the court we desire now to lay down the following propositions of law which we believe are fully sustained by the authorities, to-wit:

First—The mere allegation in a bill of complaint that a law of a state, the judgment of a court and an ordinance of a city, or any act or conduct of a city or any one or all of its officers, impairs the obligation of a contract or deprives a person of property without due process of law or deprives anyone of the equal protection of the law is not sufficient to give a federal court jurisdiction. It is the duty of the court to carefully investigate and consider all of the allegations of the bill, the statute which is alleged to impair the obligation of the contract, the acts complained of, and before a federal court can take jurisdiction, it must clearly appear that the suit is one arising under the constitution or laws of the United States.

Second—Before an ordinance of a city or any act of its mayor and councilmen can be deemed to impair

the obligation of a contract or to deprive one of property without due process of law, such ordinance, resolution, acts or conduct must be based upon and actually authorized by some law of the state giving it or them such power because if not based upon such a law the mayor and council are acting without law or contrary to law, and they act as individuals and not as officers of the city. If they are acting as individuals in performing such acts or in threatening such acts as are set out in the bill of complaint in this case, they would be mere trespassers acting in an individual capacity and the state and not the federal court would have jurisdiction to enjoin the act.

Third—Before a law of the state can be said to impair the obligation of a contract, it must clearly show on its face that it gives power to nullify, change, alter, or repudiate such contract in some way, and, it must further appear that such law giving such power was passed by the legislature of the state subsequent to the making of the contract which is alleged to be impaired thereby.

Fourth—The repudiation of a contract by ordinance or resolution of the mayor and council of the city or the open claim of the mayor and council that said contract is void and the absolute refusal of the city or the mayor and council or both together to comply with or recognize such contract raises no federal question and allegations of such conduct on the part of the mayor

and council do not make the case one arising under the constitution and laws of the United States so as to give jurisdiction to a federal court.

Fifth—The court of last resort of a state has the right, authority and power, to construe the laws of the state and to construe any contract entered into under such law, and the federal courts are bound by such construction of both law and contract no matter how erroneous the decision of the state court may be. The supreme court of this state having held that portion of the Dexter franchise or contract under which complainant claims the right of the Light and Power Company to continue occupying the streets of the city of Clay Center with its poles and wires, to be *ultra vires* and void, such decision of said court is final on such subject and this court is absolutely bound by the same.

Sixth—Before a federal court can take *original jurisdiction*, it must clearly appear from the allegations of the bill that the case is one arising under the constitution or laws of the United States. The mere fact that it is alleged that some law of the state is in conflict with the constitution or some law of the United States will not give the federal court original jurisdiction because the presumption is that the state court will arrive at a correct decision and if the state court errs in this the remedy is by writ of error under section 709 of the Revised Statutes of the United States.

Seventh—Mere threats to destroy property unlaw-

fully made by a city or its mayor and councilmen raises no federal question and the allegation of such threats do not make the case one arising under the constitution and laws of the United States so as to give jurisdiction to a federal court.

We will take these propositions up in their regular order. Our first proposition is as follows:

FIRST—THE MERE ALLEGATION IN A BILL OF COMPLAINT THAT A LAW OF A STATE THE JUDGMENT OF A COURT AND AN ORDINANCE OF A CITY OR ANY ACT OR CONDUCT OF A CITY OR ANY ONE OR ALL OF ITS OFFICERS, IMPAIRS THE OBLIGATION OF A CONTRACT OR DEPRIVES A PERSON OF PROPERTY WITHOUT DUE PROCESS OF LAW OR DEPRIVES ANYONE OF THE EQUAL PROTECTION OF THE LAW IS NOT SUFFICIENT TO GIVE A FEDERAL COURT JURISDICTION. IT IS THE DUTY OF THE COURT TO CAREFULLY INVESTIGATE AND CONSIDER ALL OF THE ALLEGATIONS OF THE BILL, THE STATUTE WHICH IS ALLEGED TO IMPAIR THE OBLIGATION OF THE CONTRACT, THE ACTS COMPLAINED OF, AND BEFORE A FEDERAL COURT CAN ASSUME JURISDICTION, IT MUST CLEARLY APPEAR THAT THE SUIT IS ONE ARISING UNDER THE CONSTITUTION OR LAWS OF THE UNITED STATES.

If the mere allegation that the controversy was one arising under the constitution or laws of the United States would give the court jurisdiction, no kind of a case could be imagined of which the federal court could not be given jurisdiction. In the case of Water Company v. Town of Newburyport, this court said:

"If jurisdiction is to be determined by the mere fact that the bill alleged constitutional questions, there was, of course, jurisdiction. But that is not the sole criterion. On th contrary, it is settled that jurisdiction does not arise simply because an averment is made as to the existence of a constitutional question, if it plainly appears that such averment is not real and substantial, but is without color of merit. Underground Railway Co. v. New York, 193 U. S. 416, ante 259, 224 Sup. Ct. Rep., 148; Owensboro v. Owensboro Waterworks Co., 191 U. S. 358, ante 217, 24 Sup. Ct. Rep. 82; Defiance Water Co. v. Defiance, 191 U. S. 184, ante 140, 24 Sup. Ct. Rep. 63; Swafford v. Templeton, 185 U. S. 487, 46 L. ed. 1005, 22 Sup. Ct. Rep. 783; McCain v. Des Moines, 174 U. S. 168, 43 L. ed. 936, 941, 19 Sup. Ct. Rep., 644, and cases cited."

Newburyport Water Co. v. Newburyport, U.S. L., ed. Vol. 48, page 795. Opinion 799.

We will now call the attention of the court to a decision by the circuit court of appeals of the sixth circuit in which the opinion was written by Judge Lurton, now a member of this court. It was an action brought to enjoin the enforcement of an ordinance of the city of Louisville. The bill squarely averred that

the ordinance impaired the obligation of the contract under which the telephone plant was erected and that the enforcement of it would deprive complainant of his property without due process of law, the ordinance was set out in the bill. Now here was an ordinance and a square allegation that if enforced, would deprive complainant of its property without due process of law. The court, however, held after examining the ordinance and the statutes of the state that there was no law of the state as a state which clearly impaired the obligation of a contract or deprived complainant of its property without the due process of law and that, therefore, the federal court had no jurisdiction. In his opinion Judge Lurton says:

"When jurisdiction depends upon the case being one arising under the constitution or laws of the United States, the facts necessary to make such a case must be plainly shown upon the record *and it is not enough that such a question may or may not arise.*

City of Louisville v. Cumberland Tel. Co., 155 *Fed.* 725.

We also call the attention of the court to the case of St. Paul Gas Light Company against the city of St. Paul, decided by this court. The allegations in such case were about the same as the case at bar and the allegations were that a repudiation of a contract by a resolution or ordinance of a city impaired the obligation of the contract which the gas company had with the city. In speaking of the duty of the court to in-

vestigate and not hold jurisdiction unless it clearly appeared that there was some law of the state which clearly impaired the obligation of the contract, this court said:

"As, however, the authority to review the judgment of the supreme court of Minnesota in this case and in doing so to interpret the contract and enforce its obligation ARISES SOLELY BECAUSE OF THE ASSERTION THAT THE OBLIGATIONS OF THE CONTRACT HAVE BEEN IMPAIRED BY SUBSEQUENT LEGISLATION, WE WILL FIRST CONSIDER WHETHER UNDER ANY VIEW WHICH MAY BE TAKEN OF THE CONTRACT THERE IS SHOWN ON THIS RECORRD ANY ACT OF STATE LEGISLATION WHICH CAN BE PROPERLY SAID TO HAVE IMPAIRED THE OBLIGATION OF THE CONTRACT IN THE CONSTITUTIONAL IMPORT OF THESE WORDS."

St. Paul Gas Light Company v. City of St. Paul, U. S. L. ed. Vol. 45, 788.

II

SECOND—BEFORE AN ORDINANCE OF A CITY OR ANY ACT OF ITS MAYOR AND COUNCILMEN CAN BE DEEMED TO IMPAIR THE OBLIGATION OF A CONTRACT OR TO DEPRIVE ONE OF PROPERTY WITHOUT DUE PROCESS OF LAW, SUCH ORDINANCE, RES-

OLUTION, ACTS OR CONDUCT MUST BE BASED UPON AND ACTUALLY AUTHORIZED BY SOME LAW OF THE STATE GIVING IT OR THEM SUCH POWER,BECAUSE IF NOT BASED UPON SUCH A LAW AND THE MAYOR AND COUNCIL ARE ACTING WITHOUT LAW OR CONTRARY TO LAW, THEY ACT AS INDIVIDUALS AND NOT AS OFFICERS OF THE CITY. IF THEY ARE ACTING AS INDIVIDUALS IN PERFORMING SUCH ACTS OR IN THREATENING SUCH ACTS AS ARE SET OUT IN THE BILL OF COMPLAINT IN THIS CASE, THEY WOULD BE MERE TRESPASSERS ACTING IN AN INDIVIDUAL CAPACITY AND THE STATE AND NOT THE FEDERAL COURT WOULD HAVE JURISDICION TO ENJOIN THE ACT.

On this proposition it must be borne in mind that the allegations of the amended bill were that the council of the city attempted to repudiate the contract made with Dexter and his assigns, that without notice to the complainant the mayor and council took some action the details of which were unknown to complainant resulting in a denial of liability growing out of said contract. In paragraph 5 it is alleged that the mayor and council threatened to interfere with the use, occupation and ownership of said electric light plant, its business and equipment by destroying its poles and wires. In the amended bill there was no allegation of any law of the state of Kansas authorizing the passage of any

ordinance or authorizing the threatened acts of the mayor and council. There is an attempt to set up the decision of the supreme court of Kansas as authorizing the same, but the allegation is that it does IF such judgment and decision is permitted to have the effect claimed for such decision by the city. Then follows paragraph 7 heretofore set out that while it is pretended by the city and the other defendants that the judgment of the supreme court gives them a right to do such things such pretense is a sham and that nothing in the decision of the supreme court justifies the destruction of the property of the complainant.

Now if there was no statute of Kansas authorizing an ordinance relating to the removal of the poles and wires and no statute of Kansas passed subsequent to the making of the Dexter contract authorizing the tearing down and removal of the poles and wire and if as alleged the pretense of the city that the judgment of the supreme court authorized the threatened act was a mere sham and that nothing in the decision justified the destruction of the property then it follows as a necessary consequence that the state has done nothing to deprive complainant of its property without due process of law nor to impair the obligation of any contract.

If the state has done nothing and the mayor and councilmen in the acts threatened were going beyond the decision of the supreme court as alleged in the amended bill then it would not be the city that was acting but the individual councilmen and they not as

officers of the city but as mere individual trespassers and violators of the law of the state of Kansas and hence such allegations do not show the case to be one arising under the constitution or laws of the United States.

Upon this proposition we desire to call the courts' attention to a case decided by the circuit court of the northern district of Illinois. The city of Chicago passed a pure-food ordinance by which it appointed meat and food inspectors and duly authorized an inspection of all places where meat, poultry, fish and other food articles should be stored, and authorizing the employes of the health department to seize, condemn and destroy all putrid food found therein. The North American Cold Storage Co. brought an action in the circuit court to enjoin the city of Chicago from interfering with their business by threatened arrests and threats and refusals to allow goods to be received at its warehouse, and to enjoin the seizure and condemnation and destruction of certain barrels of poultry and to enjoin the city from carrying out similar threats in the future.

The bill alleged that they threatened to refuse to allow goods to be received at the warehouse, whether wholesome or otherwise, and threatened to seize and destroy poultry that was not spoiled, but a healthful article of food. The bill then alleged that the defendants in committing the acts and making the threats complained of "claimed to be, and were acting under and by virtue of section 1161 of the revised municipal code

of the city of Chicago of 1905." It was further alleged that this ordinance "insofar as it attempts to authorize the city of Chicago, its agents, servants and employes to seize, condemn or destroy food or other products is in conflict with the fourteenth amendment of the constitution of the United States."

The court held that under the ordinance no contract or right of any kind was impaired and that it was not in conflict with the fourteenth amendment because the ordinance only authorized them to destroy putrid, decayed, poisoned and infected food, and that this, under the police power of the state, the city had a right to do. The court further held that if the mayor and council attempted under said ordinance to interfere with complainant's business and not to allow goods to be receievd at its warehouse and to destroy wholesome food that this was contrary to the ordinance and the laws of the state and that such acts of the mayor and council were not the acts of the city but mere private acts and private trespasses and that therefore the state or city was not impairing the obligation of any contract nor depriving any person of property without due process of law, and that the matter was a question for the state courts only.

Now, keeping in mind the fact that the allegations in the bill in the case at bar all the way through are that these threatened acts are unlawful and any pretense that the city may make or that the mayor or council may make that they have the right to do the same because

of the decision of the supreme court above mentioned is a mere sham,, and in view of the further allegations of the bill that that the decision of the court gives them no such authority we say that the threatened acts in this case would be the acts of private individuals, of private trespassers, and there would be no federal question in this case.

In passing upon the question, the court, Judge Kohlsaat presiding, among other things said:

"KOHLSAAT, Circuit Judge. Bill to restrain defendants from alleged interference with complainant's business by threatened arrests, refusal to allow goods to be received at its warehouse, the seizure and threatened condemnation and destruction of certain barrels of poultry, and threats of similar acts in the future. The bill alleges that the defendants, in committing the acts and making the threats complained of, claimed to be, and were acting under and by virtue of section 1161 of the revised municipal code of the city of Chicago of 1905, which is set out in the bill as follows:

"'Every person being the owner, lessee or occupant of any room, stall, freight house or other place, other than a private dwelling, where any meat, fish, poultry, game, vegetables, fruit or other perishable article adapted or designed to be used for human food, shall be stored or kept, whether temporarily or otherwise, and every person having charge of, or being interestd or engaged, whether as principal or agent, in the care of or in respect to the custody or sale of any such article of food supply shall put, preserve and keep such article of food supply in a clean and wholesome condition, and

shall not allow the same, nor any part thereof, to become putrid, decayed, poisoned, infected or in any other manner rendered or made unsafe or unwholesome for human food; and it shall be the duty of the meat and food inspectors and other duly authorized employes of the health department of the city to enter any and all such premises above specified at any time of any day, and to forthwith seize, condemn, and destroy any such putrid, decayed, poisoned and infected food, which any such inspector may find in and upon said premises.'

"It is further alleged that the ordinance 'insofar as it attempts to authorize the city of Chicago, its agents, servants and employes to seize, condemn or destroy food or other products, is in conflict with he fourteenth amendment to the constitution of the United tSates.'

"The cause is now before the court on demurrer to the bill.

* * * * * * *

From the view the court takes of the case, it becomes unnecessary to pass upon the other questions raised. This suit is brought against the city of Chicago and certain of its officers in their official capacity. It would seem very clear that the defendants cannot be held in this court for acts or threats which they have no power or authority from the state to perform, for if there is no ordinance under which they could, with any color of reason claim to be acting, their acts are not the acts of the state, but mere private acts. While it is alleged that defendants acted and claimed to act under the provisions of section 1161 of the Revised Municipal Code of the city of Chicago, it will be observed that under no possible construction of the ordinance could defendants claim the right of general stoppage of the entire business of complainant in storing admittedly

wholesome articles of food, so that it would seem that these acts were those of mere trespassers, and plainly without the sanction of the state. As to these acts, therefore, the remedy must be in the state courts, there being no constitutional question involved necessary to give the court jurisdiction.

* * * * * * * * * *

As above stated, the ordinance by its terms in no sense contravenes the provisions of the fourteenth amendment. Manifestly any abuse of the power granted by it would present no federal question. "Nor," as stated in Lawton vs. Steele, supra, "Is a person whose property is seized under the act in question without his legal remedy. If in fact his property, has been used in violation of the act, he has no just reason to complain; if not he may replevy his nets from the officer seizing them, or, if they have been destroyed, may have his action for their value." * * * * * *

"The demurrer is therefore sustained, and the bill dismissed for want of jurisdiction."

North American Cold Storage Co. vs. City of Chicago. 151 Fed. Rep. 120. Opinion 121.

It must be borne in mind that the written opinion filed in this case by the presiding judge of the lower court was based upon the demurrer to the amended bill instead of the second amended bill, but we claim that the second amended bill added nothing of a jurisdictional character to the amended bill except a mere allegation that a statute of Kansas, passed in 1905, gave the council and the city certain power, and, therefore,

impaired the obligation of the Dexter contract, but when the statute of the state is read it is clear that it did nothing of the kind and a mere allegation that it did does not make it so. We desire, therefore, to discuss the amended bill and show that the court was right in sustaining the demurrer to the amended bill. The court, however, actually passed upon the merits of the statute in the opinion filed because it was set up in the brief of complainants and argued on both sides by counsel for both parties. The authorities cited by us in sustaining the first decision of the court will all be applicable to the court's action in sustaining the demurrer to the second amended bill. With this explanation we will proceed with the argument in the same order as we did in the court below. On this second proposition we will call the court's attention to a decision by the circuit court of appeals for the Sixth district in which Judge Lurton, now of the supreme court, rendered the opinion.

The action was brought to enjoin and restrain the city of Louisville from enforcing a municipal ordinance regulating the charge for telephone service in the city of Louisville. It charged that the ordinance was in violation of the obligations of a contract between the complainant, the telephone company, and the city, and also that if said ordinance was enforced, it would deprive complainants of their property without compensation and without due process of law guaranteed by the fourteenth amendment.

A temporary injunction was allowed and the city

of Louisville appealed from the order of the court allowing such injunction. The only question in the case was as to the jurisdiction of the court. It was conceded that there was no jurisdiction by reason of diversity of citizenship. The only question was as to it being a case arising under the constitution and laws of the United States. The bill squarely averred that the ordinance impaired the obligation of the contract under which the telephone plant was erected and that the enforcement of it would deprive complainant of its property without due process of law.

The bill, however, after such allegations alleged: That the city had no power to regulate the rates charged by the complainant or other telephone companies under the constitution and laws of the state of Kentucky or in any other way, and that said ordinance was beyond the power of the common council of the city, and was therefore, void. There was no allegation that there was any statute of the state of Kentucky authorizing the passage of the ordinance. It was alleged, however, in the bill that the common council assumed and claimed to have been given the authority by the legislature of the commonwealth of Kentucky to regulate charges and rates to be charged by telephone companies, just exactly as it is alleged in the bill in this case that the council and the city claim authority to do what it is alleged they will do by virtue of a decision of a supreme court of Kansas.

The case is in all respects like the one at bar. In the case at bar, while it is alleged that the mayor and

council claim and assume to have the right to commit the threatened acts by reason of the supreme court decision it is alleged in the bill in this case that such decision gives them no such power. So it will be seen that the allegation of the bill passed upon by the court of appeals an the bill in the case at bar are exactly alike in these respects. Both allege that the council assume to be acting under authority of the state, but the bills allege in both instances that no such authority has been given. In the case in question, Judge Lurton, speaking for the court, held that there was no federal question because the constitution of the United States only prohibits the state and the state alone from impairing the obligation of a contract and the state and the state alone from depriving parties of their property without due process of law, and Judge Lurton further held that to give to a municipal ordinance the effect and force of a law of the state, it must have been enacted in the exercise of some legislative power conferred by the state in the premises. That this court may see the direct bearing of this decision upon the case at bar we quote the whole opinion, which is as follows:

"Lurton, Circuit Judge: This is a bill filed in the circuit court to restrain the enforcement of a municipal ordinance regulating charges for telephone service in the city of Louisville on the ground that the ordinance was violative of the obligation of a contract between the complainant and the city, and also on the ground that the rates prescribed were unreasonable, unjust and confiscatory, and, if enforced, would deprive

complainants of their property without compensation and without that due process of law guaranteed by the fourteenth amendment. An injunction pendente lite was allowed upon the averments, and from this order the city of Louisville has appealed upon the seventh section of the Court of Appeals act, as amended by act 14, 1906, c. 1627, 34 Stat. 116. The propriety of the preliminary injunction must turn here upon the question of the jurisdiction of the circuit court. There was no jurisdiction by reason of diversity of citizenship; the complainant being a business corporation created under the laws of Kentucky and the defendant a municipal corporation of the same state. Jurisdiction was invoked upon the contention that this is a suit arising under the constitution and laws of the United States. That the bill does aver that the ordinance impairs the obligation of a contract and is also an attempt to deprive complainant of its property without due process of law, is plain enough. But the constitutional prohibitions which are invoked run against the state, and the state alone, while the bill of the complainant in plain words negatives state action by averring that "no power to regulate the rates charged by your orator or telephone companies" has been granted "by the constitution or the legislature of the state of Kentucky, or in any other way," and that the enactment of said ordinance was and is beyond the power of the common council of said city, and the said "ordinance void and an assumption of power and authority upon the part of the said common council unwarranted and unfounded."

If this be true, there was no state authority behind the action of the Louisville common council, and no ground to claim that constitutional prohibitions have been violated which are pointed at state aggression only.

A municipal ordinance may be the exercise of a delegated legislative power conferred upon it as one of the political subdivisions of the state; but, to be given the effect and force of a law of the state, it must have been enacted in the exercise of some legislative power conferred by the state in the premises. Murray v. Charleston, 96 U. S. 432, 440, 24 L. Ed., 760; New Orleans Water Works v. La. Sugar Co., 125 U. S. 18, 31, 8 Sup. Ct. 741, 31 L. Ed. 607; Hamilton Gas-Light Co. v. Hamilton, 146 U. S. 258, 266, 13 Sup. Ct. 90, 36 L. Ed. 962; Iron Mountain R. R. Co. v. Memphis, 96 Fed. 113, 126, 37 C. C. A. 410; St. Paul Gas Co. v. St. Paul, 181 U. S. 142, 148, 21 Sup. Ct. 575, 45 L. Ed. 788; Blakney v. City of New York, 193 U. S., 430, 24 Sup. Ct. 502, 48 L. Ed. 737; Manhattan Railway v. City of New York (C. C.) 18 Fed. 195; Kiernan v. Multnomah County (C. C.) 95 Fed. 849; and Savannah, etc., Ry. Co. v. Savannah, 198 U. S. 392, 25 Sup. Ct. 690, 49 L. Ed. 1097.

In the Hamilton Gaslight Co. v. Hamilton, cited bove, Justice Harlan said:

"A municipal ordinance, not passed under supposed legislative authority, cannot be regarded as a law of the state within the meaning of the constitutional prohibition against state laws impairing the obligations of contracts. Murray v. Charleston, 96 U. S. 432, 440, 24 L. Ed. 760; Williams v. Bruffy, 96 U. S. 176, 183, 24 L. Ed., 716; Lehigh Water Co. v. Easton, 121 U. S. 388, 392, 7 Sup. Ct. 916, 30 L. Ed., 1059; N. O. Waterworks v. Louisana Sugar Co., 125 U. S. 18, 31,

38, 8 Sup. Ct. 741, 33 L. Ed., 607. A suit to prevent the enforcement of such an ordinance would not, therefore, be one arising under the constitution of the United States."

If the state has conferred authority upon the municipality to establish and enforce reasonable rates for telephone service then the establishment of rates under this power would be the establishment of rates by the state itself. Reagan v. Farmers Loan & Trust Co., 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014. But this is just what te bill charges has not been done, thereby depriving the circuit court of every foundation for its jurisdiction as a suit arising under the constitution or laws of the United States. Counsel may now say that the averment that no power has been delegated by the state to the city of Louisville to regulate the rates to be charged for telephone service, to be rendered in the city, is a mistaken averment of law, and should be ignored in consequence of a prior statement of the bill, in which it is said that "the common council of the city of Louisville assumed and claimed to have been given the authority by the legislature of the commonwealth of Kentucky to regulate the charges and rates to be charged by telephone companies;" and had upon such assumption passed the ordinance complained of. Counsel says this shows that the city council acted under color of authority and should save the jurisdiction. But these averments are not inconsistent, and do not bring the case within the Savannah, etc. Ry. Co. v. Savannah cited above, where there were inconsistent

and contradictory averments as to the authority for the tax assessment in question. That the common council "assumed" and "claimed" to have the power to do what it did do is self-evident. The enactment of the ordinance is in itself, and from any point of view, an assumption and claim of right to do what it did. This averment is therefore far from an averment that the common council was exercising a power of regulation conferred by the state. To make it clear that it had no general regulating power over such companies, and that was acting outside of any such delegated regulating power, the clause relied upon now as asserting that the city council did act by authority of the state was followed by the distinct averment, above referred to, that the council acted without any authority from the state. This makes an issue under the law of the state. If the fact be that no provision of the state constitution, or of state law, or of the municipal charter, delegates the state power in respect to the regulation of the charges of telephone companies rendering services within the city of Louisville, the ordinance is void as *ultra vires*, and its enactment did not violate any prohibition of the constitution of the United States, because not enacted in pursuance of any state authority.

When jurisdiction depends upon the case being one arising under the constitution or laws of the United States, the facts necessary to make such a case must be plainly shown upon the record, and it is not enough that such a question may or may not arise. New Orleans v. Benjamin, 153, U. S. 411, 14 Sup. Ct. 905, 38 L.

Ed., 764; McCain v. Des Moines, 174 U. S. 168, 181, 19, Sup. Ct. 644, 43 L. Ed. 936; Western Union Tel. Co. v. Ann Arbor R. R. Co., 178 U. S. 239, 20 Sup. Ct. 867, 44 L. Ed. 1052; Manhattan R. R. Co. v. City of New York (CC) 18 Fed. 195; Levy v. Shreveport (CC) 28 Fed. 209.

The most that can be made of the averments of this bill is that it presents questions arising under the constitution and laws of the state. The remedy in such cases is in the courts of the state. If it shall turn out that the common council did have general power to regulate the charges of telephone companies rendering services without the city of Louisville, and that it has illegally exercised that power, either because it has thereby impaired the obligation of a contract, or by imposing rates which are unjust and confiscatory, a federal question may arise when the bill expressly avers that the action of the common council is not imputable to the state by charging that no such power has been delegated to the state.

The conclusion is that the court below erred in allowing an injunction, because it was without jurisdiction to entertain the bill at all.

Remanded, with direction to dissolve the injunction and dismiss the bill."

City of Louisville v. Cumberland Tel. Co., 155 Fed. Rep. 725. Opinion 728.

Under this proposition the next case we desire to

call the court's attention to is Defiance Water Company vs. the City of Defiance, decided by this court. The city of Defiance had granted a franchise to the Defiance Water Company. After the water plant had been established and the city was using the water, the city came to the conclusion that its contract with the water company was void and in the language of the bill passed an ordinance or resolution rescinding and annulling its contract with the city. Then the Defiance Water Company filed its bill in the circuit court of the United States against the city and its councilmen alleging that the city council of Defiance at a time mentioned, had duly passed an ordinance entitled "An Ordinance to Authorize and Provide for the Construction and Maintenance of a System of Waterworks in the City of Defiance," and attaching a full copy of said ordinance to the bill. The bill alleged that the ordinance gave to its assignors, Bullock & Co., the privilege to operate a system of waterworks in the city and gave to them the use of the streets and alleys of the city for such purpose. That in said ordinance the city contracted with Bullock & Co., its predecessors and assignors, for a certain number of hydrants and to pay rental therfor, and that the city had a right to purchase the same after ten years. Then follows the allegation that the works were built and operated for the company, that the city had used the hydrants, was still using them when the suit was commenced. The bill then alleged that "at its regular meeting January 7th, 1896, the council passed an ordinance or resolution in substance rescinding and an-

nulling said contract of the city with the Defiance Water Co., your orator, so far as it had power so to do, and providing by the terms of said ordinance or resolution by which it should allow the bill of said water company for the rent that had accrued to them from the said city for the last half of the year 1895, that the payment of said bill should not be construed or taken to be an acknowledgment of any contract between them and the said city for said water rentals or in any manner implying ..... actual performance of any alleged contract and that no further payment at the present rate be made to said company."

The bill then went on to allege that the mayor and council after the passage of said ordinance had claimed, publicly, that the city had no such contract for furnishing water to it by the complainant. That said mayor and council had also passed a resolution and ordinances looking toward the construction of waterworks by the city. The bill then alleged: "That if said order of injunction shall stand and be made perpetual, the said city and council of Defiance, said defendants, will thereby deprive your orator of its property without due process of law, and by menas of said order of injunction they will confiscate your orator's property and convert it to their own use without payment therefor and without trial by jury, contrary to the provisions of the constitution of the United States."

The bill was dismissed by the circuit court of the United States but not upon the ground that the court

had no jurisdiction. The supreme court of the United States was so aroused by just the kind of an attempt as is made i this case to drag into a federal court a case where the court had no jurisdiction, that notwithstanding the fact that the court had dismissed the bill on other than jurisdictional grounds, it reviewed the case and reversed the order of the circuit court, dismissing it upon other grounds, and ordered the circuit court to dismiss it upon the ground that it had no jurisdiction, it simply being an attempt to bring into that court a case between citizens of the same state in a case in which there was no federal question.

In speaking on the question, the court, through Chief Justice Fuller, said:

"We regard this bill as an attempt to evade the discrimination between suits between citizens of the same state, and suits between citizens of different states, established by the constitution and laws of the United States, by bringing into the circuit court controversies between citizens of the same state an evasion which it has been the constant effort of congress and of courts to prevent (Bernards Twp. v. Stebbins, 109 U. S. 341, 353, 27 L. Ed., 956, 960, 3 Sup. Ct. Rep. 272; Shreveport v. Cole, 129 U. S. 36, 44, 32 L. Ed. 589, 592, 9 Sup. Ct. Rep. 210); and are of the opinion that it should have been dismissed for want of jurisdiction.

"The fundamental question of jurisdiction: first, of this court, and then of the court from which the record comes, presents itself on every writ of error or appeal, and must be answered by the court, whether

propounded by counsel or not. Mansfield C. & L. M. R. Co. v. Swan, 111 U. S. 379, 382, 28 L. ed. 462, 464, 4 Sup. Ct. Rep. 510; Metcalf v. Watertown, 128 U. S. 586, 32 L. ed. 543, 9 Sup. Ct. Rep. 173; Morris v. Gilmer, 129, U. S. 315, 32 L. ed. 690, 9 Sup. Ct. Rep. 289; Continental Nat. Bank v, Buford, 191 U. S. 119, ante, 119, 24 Sup. Ct. Rep. 54.

"The circuit court having maintained jurisdiction on the ground that the case arose under the constitution of the United States, and having proceeded to decree, the appeal was properly brought directly to this court, and it at once became our duty to inquire whether the circuit court should have retained the case. Having reached the result that the court erred in so doing, we are vested with the power to direct that conclusion to be carried into effect, and in its exercise, we discharge one of our essential functions—the determination of the jurisdiction of the courts below. Morris v. Gilmer 129 U. S. 315, 32 L. ed. 690, 9 Sup. Ct. Rep. 289; Wetmore v. Rymer, 169 U. S. 115, 42 L. ed. 682, 18 Sup. Ct. Rep. 293; Aztec Min. Co. v. Ripley, 151 U. S. 79, L. ed. 80, 14 Sup. Ct. Rep. 236.

The bill was dismissed by the circuit court but not for want of jurisdiction, and the decree will be reversed in order that the case may be disposed of on that ground, at the costs of appellant, which takes nothing by its appeal.

"The decree is remanded at appellant's costs, and the cause remanded, with instructions to dismiss the bill for want of jurisdiction."

Defiance Water Co. v. Defiance, 48 L. ed. 140.
Op. 144.

It will be noticed in the above case the circuit court had dismissed the bill but not on the grounds that the court had no jurisdiction. The rule of this court is so strict that the bill must on its face show jurisdiction and that the case is one arising under the constitution or laws of the United States, that notwithstanding the fact that the court had dismissed the bill this court remanded the case back to the circuit court and ordered it to dismiss the bill on the grounds of want of jurisdiction.

Let us call the court's attention to the case of Hamilton Gas-Light and Coke Co. vs. the City of Hamilton. In this case it was alleged that the city of Hamilton had passed an ordinance directly impairing the obligation of a contract. It sought to enjoin the enforcement of such ordinance. There was no law, however, in Ohio passed by the state authorizing the passage of any such ordinance. It will be seen that it is the case at bar exactly, as the statute in question in the case at bar gives no authority to any city to abrogate or annul any existing contract. This court held that such an ordinance passed by a city did not make the case one arising under the constitution of the United States. In passing upon the question the court, speaking through Mr. Justice Harlan, said:

"The plaintiff's first contention is that there is no statute of Ohio authorizing any city in which there is gas works in full and complete operation, to erect gas works, or to levy a tax for that purpose. If this were conceded, we should feel obliged—the plaintiff and de-

fendant both being corporations of Ohio—to reverse the judgment, and remand the cause with directions to dismiss the suit for want of jurisdiction in the circuit court. The jurisdiction of that court can be sustained only upon the theory that the suit is one arising under the constitution of the United States. But the suit would not be of that character, if regarded as one in which the plaintiff merely sought protection against the violation of the alleged contract by an ordinance to which the state has not, in any form, given or attempted to give the force of law. * * * * A suit to prevent the enforcement of such an ordinance would not, therefore, be one arising under the constitution of the United States."

> Hamilton Gaslight & Coke Co. v. City of Hamilton, U. S. 36 L. ed. 963. Opinion 967.

The city of St. Paul granted a franchise to the St. Paul Gas Light Company to put in a gas plant and to use the streets for its pipes and lamp posts. Among the conditions of the contract with the gas light company was one that whenever the city of St. Paul should by resolution direct that lamps should be erected and lighted in the streets of the city, the company should contract therefor and immediately proceed to set up the lamps at their own proper expense, and the city in consideration therefor should pay quarterly to the gas company eight per cent interest on the original cost of construction. After the gas light company had put in its gas lamps in certain portions of the city, electricity came to be in general use in said city. The city ordered

and placed electricity in a portion of the city to such an extent that the gas lamps were useless, and were no longer used. The gas company, however, insisted that it was the duty of the city to pay quarterly eight per cent of the original cost of erecting the lamp posts whether in use or not. The gas company presented its bill for the quarterly interest and the city refused to pay, but on the other hand, passed an ordinance or a resolution denying any obligation under the contract to pay such interest and ordering the gas company to remove the street lamp posts in that portion of the city. The gas copmany then brought suit. The lower court of Minnesota decided in favor of the gas company. The case was then appealed to the supreme court of Minnesota, and that court decided in favor of the city and held that the city was not under any obligation to pay the quarterly interest. The case was then taken to the supreme court of the United States upon writ of error, and the question before the court was as to whether or not the ordinance of the city of St. Paul in denying its obligation under the contract and ordering the removal of the lamp posts amounted to a law of the state impairing the obligation of a contract, and thus presenting a federal question, which would give a federal court jurisdiction.

In passing upon the question, the court, by Mr. Justice White, among other things said:

"Was there a contract, and if yes, what obliga-

tions arose from it? And has there been state legislation impairing the contract obligation? Abstractly speaking, the duty would be first in order to determine whether the contract existed and its true meaning, before ascertaining if any obligation of the contract would be impaired by subsequent legislation. As, however, the authority to review the judgment of the supreme court of Minnesota in this case and in doing so to interpret the contract and enforce its obligations ARISES SOLELY BECAUSE OF THE ASSERTION THAT THE OBLIGATIONS OF THE CONTRACT HAVE BEEN IMPAIRED BY SUBSEQUENT LEGISLATION, WE WILL FIRST CONSIDER WHETHER UNDER ANY VIEW WHICH MAY BE TAKEN ON THIS RECORD ANY ACT OF STATE LEGISLATION WHICH CAN BE PROPERLY SAID TO HAVE IMPAIRED THE OBLIGATION OF THE CONTRACT IN THE CONSTITUTIONAL IMPORT OF THESE WORDS."

After speaking on other questions and finding that there was no state law passed subsequently to the entering into the contract with the gas company, the question reduced itself simply to the question whether in the absence of state law, the ordinance of the city of St. Paul repudiating the contract and ordering the lamp posts removed from the streets, amounted to state action impairing the obligation of a contract.

On this question Mr. Justice White said:

"Referring to the ordinance in question from the

provisions of which it is alone contended the impairing of the contract arose, it will be seen that only two subjects are therein referred to: the first a command by the city to the gas company to forthwith remove the gas street lamp posts in that portion of the city now lighted by electric light under contract with the said company, which said lamps have been discontinued by order of the board of public works; and, second, a declaration on the part of the municipal council of St. Paul of its intention not thereafter to pay the gas company interest on the cost of construction of the lamps so directed to be removed. If, then, there be any subsequent legislation, impairing the obligation of a contract, it must arise from one or both the provisions just referred to. Now, it is apparent that the command given by the city to the gas company, to remove the unused gas lamp posts from the streets in no way even tended to impair the obligation, if any, resting on the city to pay interest on the cost of the construction of the lamp posts which were ordered to be removed, since in any event, if the contract imposed the obligation to make such payment, the duty of the city to do so was left absolutely unaffected by the order to remove. That is to say, if the duty to pay was created by the contract, such obligation remained wholly untouched by the order of removal. This being true, it results that the order to remove the unused lamp posts can not be treated as an impairment of the obligations of the contract without saying that such obligations were destroyed, although they were absolutely unaffected by the act which it is asserted brought about the impairment. And it will become at once manifest from a consideration of the remaining provision of the ordinance that the same result must follow. The other provision in question created no new right or imposed no new duty substantially

antagonistic to the obligations of the contract, but simply expressed the purpose of the city not in the future to pay the interest on the cost of construction of the lamp posts which were ordered to be removed. That is to say, it was but a denial by the city of its obligation to pay, and a notice of its purpose to challenge in the future the existence of the duty to make such payment. This denial while embodied in an ordinance, was no more efficacious than if it had been expressed in any other form, such as by way of answer filed on behalf of the city in a suit brought by the company against the city to enforce what it conceived to be its rights under the contract. When the substantial scope of this provision of the ordinance is thus clearly understood, it is seen that the contention here advanced of impairment of the obligations of the contract arising from this provision of the ordinance reduces itself at once to the proposition that whenever it is asserted on the one hand that a municipality is bound by a contract to perform a particular act and the municipality denies that it is liable under the contract to do so, thereby an impairment of the obligations of the contract arises in violation of the constitution of the United States. But this amounts only to the contention that every case involving a controversy concerning a municipal contract is one of federal cognizance, determinable ultimately in this court. Thus, to reduce the proposition to its ultimate conception is to demonstrate its error.

* * * * * * *

"As it is apparent from the foregoing considerations that even conceding the contract to be as contended for, no legislative act is shown to exist, from the enforcement of which an impairment of the obligations of the contract—within the purview of the constitution—did or could result, it follows that the record involves

solely an interpretation of the contract, and therefore presents no controversy with the jurisdiction of this court."

St. Paul Gaslight Co. v. City of St. Paul, U. S., 45 Law ed. 788. Opinion 792, 793.

From the above authorities it seems clear that before an ordinance of the city or any act of its mayor or councilmen can be held to impair the obligation of a contract or to deprive one of property without due process of law within the meaning of the constitution of the United States, such acts and such ordinance must be actually based upon and authorized by a law of the state giving to such city and such mayor and councilmen the power and authority to pass such ordinance or perform such act.

III.

THIRD—BEFORE A LAW OF THE STATE CAN BE SAID TO IMPAIR THE OBLIGATION OF A CONTRACT, IT MUST CLEARLY SHOW ON ITS FACE THAT IT GIVES POWER TO NULLIFY, CHANGE, ALTER, OR REPUDIATE SUCH CONTRACT IN SOME WAY, AND, IT MUST FURTHER APPEAR THAT SUCH LAW GIVING SUCH POWER WAS PASSED BY THE LEGISLATURE OF THE STATE SUBSEQUENT TO THE MAKING OF THE CONTRACT WHICH

IS ALLEGED TO BE IMPAIRED THEREBY.

Under this head permit us to say that in the amended bill no law passed by the legislature of the state subsequent to entering into the contract with Dexter, his successors and assigns, was plead or set out. The allegation was that the decision of the supreme court of Kansas impaired the obligation of the contract and deprived complainant of its property without due process of law, if it could be construed as the city pretended to construe it. Let us keep in mind that the law construed by the supreme court of Kansas in its decision was a law passed thirteen months before the Dexter contract was entered into. Now a party entering into a contract under such a law must always take his chances as to what the construction of such law may be by the court of last resort of the state and whatever that construction may be the contracting parties are bound by it. A law passed before entering into a contract cannot possibly impair the obligation of a contract made and entered into subsequent to the passage of the law, and the interpretation of such a law couldn't possibly be depriving a person of property without due process because the contracting parties were bound to know the meaning of the law when they entered into the contract. On this subject we desire to call the court's attention to the case of Brown v. Smart, decided by this court. In passing upon this question, among other things, this court said:

"In the case before us the only plaintiff in error

is the insolvent himself. The position taken by him in the court below, but not argued in this court, that the obligation of a contract with him has been unconstitutionally impaired is clearly untenable, because the law of the state was in existence when the contract was made, and a subsequent decision of the court of appeals was not a law, within the meaning of the provision of the constitution which declares that no state shall pass any law impairing the obligation of contracts."

Brown v. Smart, U. S. Law ed. Vol. 36, 773. Opinion 775.

Let us call the attention of the court also to the case of Railway Company v. The State of Texas, decided by this court. The railway company was not possessed with any power to contract or do anything else until 1870. There had been a law prior to 1870 which gave land grants for the building of railways. This power was taken away by the constitution of Texas of 1869. The railway company claimed it was entitled to land under the land grant act of the state of Texas because it succeeded to the rights of a prior company. Its contract, however, was subsequent to the adoption of the constitution of 1869. This court held that the adoption of the constitution in 1869 could not possibly impair the obligation of a contract made subsequent to 1870. In its opinion the court said:

"The old company did not possess the right by existing law to build the road in question or branch lines, and the authority to construct it was not given until July 27, 1870, at which time the constitution of Texas

forbade the granting of lands to railroad companies. And if there were no contract prior to July 27, 1870, to give land for the construction of a line of road from Columbus to San Antonio and thence west, the constitution of 1869 could not operate to impair such."

> Galveston, H. & S. A. R. Co. v. State of Texas, U. S. Law ed. 42, page 1017. Opinion 1021.

We will next call the attention of the court to a decision of the supreme court of the United States, in the case of Lehigh Water Co. vs. The Borough of Easton. An action was brought by the Lehigh Water Co. for the purpose of enjoining the authorities of the borough from constructing a municipal water plant and from appropriating money therefor. In 1880 the Lehigh Water Co. accepted the provision of an act of the general assembly of Pennsylvania approved April 20, 1874, relating to corporations. By such acceptance it acquired the privileges, immunity, franchises and powers conferred by the act upon corporations created under it. By accepting the provisions of said act, it succeeded by a judicial sale to the rights, powers, privileges and franchises of the Westward Company, a corporation which maintained a system of waterworks in the borough of Easton.

After the acceptance by the Lehigh Water Co. of the provisions of the law of 1874, the constituted authorities of the borough of Easton under the provisions of a law passed in 1867, determined to construct and

maintain a system of waterworks for supplying the inhabitants with water. It was claimed on the part of the Lehigh Company that this law of 1867 impaired the obligation of its contract for the exclusive right to furnish water to the city.

The supreme court of Pennsylvania held that the exclusive right acquired by the Lehigh Water Company under the act of 1874 was exclusive only against other private companies and did not prohibit the company under the law of 1867 from building a municipal plant. The case was taken on writ of error to the supreme court of the United States and in its opinion, written by Mr. Justice Harlan, the supreme court of the United States makes it absolutely plain that a statute impairing the obligation of a contract must be one passed subsequent to the making of the contract.

In passing upon the question, the court said:

"The only question presented by the record which this court can properly consider is whether the judgment below denies to the plaintiff in error any right or privilege secured by the provisions of the constitution of the United States which declared that 'No state shall pass any law impairing the obligation of contracts.' Obviously this clause cannot be invoked for the reversal of the judgment below. It is equally clear that the law of the state to which the constitution refers in that clause must be one enacted after the making of the contract the obligation of which is claimed to be impaired. Neither the Lehigh Water Company nor its predecessor had, under any statute enacted prior to

1874, an exclusive right to maintain water works in the borough of Easton for supplying its inhabitants with water. Nor did the grant to the borough in the acts of 1867, of the power to construct and maintain a system of public water works, infringe any right or privilege which the plaintiff in error then had under its charter. But the claim is that the exclusive privilege acquired by the company under the statute of 1874, was impaired in value by the acts passed in 1867. It cannot, however, with propriety be said that the obligation of a contract made with the state in 1874, was impaired by statutes enacted in 1867. Whether the former repealed, by implication, the acts of 1867, presents no question arising under the national constitution. That is a question simply of statutory construction, which the state court was competent to determine, and whose judgment in respect thereto is not subject to re-examination in this court. Had the borough of Easton been authorized by a statute enacted after the Lehigh Water Company had acquired the exclusive privilege given by the acts of 1874, then this court would have been compelled to decide, upon its independent judgment, whether there was a contract between the state and the company, and, if there was a contract, whether its obligation was impaired by a law subsequently enacted. Louisville Gas Co. v. Citizens Co., 115 U. S. 683, 697 (29: 510, 515).

Lehigh Water Co. v. Borough of Easton, U.S. Law ed., vol. 30, page 1059. Opinion 1060.

IV.

FOURTH:—THE REPUDIATION OF A CONTRACT BY ORDINANCE OR RESOLUTION OF

THE MAYOR AND COUNCIL OF THE CITY OR THE OPEN CLAIM OF THE MAYOR AND COUNCIL THAT SAID CONTRACT IS VOID AND THE ABSOLUTE REFUSAL OF THE CITY OR THE MAYOR AND COUNCIL OR BOTH TOGETHER TO COMPLY WITH OR RECGONIZE SUCH CONTRACT RAISES NO FEDERAL QUESTION AND ALLEGATIONS OF SUCH CONDUCT ON THE PART OF THE MAYOR AND COUNCIL DOES NOT MAKE THE CASE ONE ARISIOG UNDER THE CONSTITUTION AND LAWS OF THE UNITED STATES SO AS TO GIVE JURISDICTION TO A FEDERAL COURT.

Under this head we desire to call the attention of the court to a decision of this court, which seems to have been made to order to fit this case. The city of Dawson, Georgia, had passed an ordinance granting a franchise to the Dawson Waterworks Co. to occupy its streets, alleys and public grounds for the purpose of maintaining a waterworks system to supply the city and its inhabitants with water. The city afterwards came to the conclusion that said contract was void and not binding upon it. After the Dawson Water Co. had erected its plant it mortgaged the same to the Columbia Avenue Saving Fund Safe Deposit Title & Trust Co., hereafter called the "trust company." After the repudiation of the contract by the city, the mortgagee trust

company filed its bill in equity in the circuit court of the United States for the northern district of Georgia, to restrain the city from taking measures to build a new waterworks plant and to compel it to specifically perform the contract made with the waterworks company in 1890 and to pay the company or its mortgagees a certain sum for the use of its water for twenty years.

The trust company was a citizen of the state of Pennsylvania. When the suit was first brought the only ground of jurisdiction alleged was diversity of citizenship. The suit was brought against the city of Dawson and the Dawson Waterworks Co. as defendants, just as in this case, the mortgagee makes the owner and the city of Clay Center defendants.

The city of Dawson and the Dawson Waterworks company were both citizens of Georgia. There being no controversy between the mortgagee and mortgagor, but the real controversy being between the water company and the city of Dawson, it was a clear case, on realignment of parties according to their interests, of parties to the controversy on each side of the question who were citizens of the state of Georgia. After the city of Dawson denied the jurisdiction of the court and alleged that the waterworks company was the real plaintiff and belonged on the plaintiff's side of the controversy, and was made a defendant solely to avoid the effect of a decision by the supreme court of the state in a suit of the waterworks company against the city, to the effect that the contract relied upon was void, and for the mere purpose of attempting to get into the fed-

eral court, the trust company, the mortgagee, did just exactly what was done in this case after the demurrer had been filed which pointed out the fact that the court had no jurisdiction on the grounds of diverse citizenship, to-wit: Filed an amended bill in which it attempted to raise a federal question.

The original bill, after stating the contract, set up a formal repudiation of the same by the city on June 27, 1894; alleged that the city refused to pay for the water; alleged that the city was attempting to collect taxes, which were by the contract were to be satisfied by the furnishing of water; it further alleged that the city had called an election to see if the city should issue bonds to erect or buy waterworks or electric lights and that the city voted in favor of a light plant and the present intent to sell the residue to erect waterworks. It then alleged that the waterworks company, recognizing plaintiff's right to be paid rental for the water in the events which had happened, which had made the waterworks company unable to pay the interest on the mortgage, had yielded to the plaintiff's demand that it should collect the rental and that the plaintiff had notified the city and had made demand and the city had refused to pay.

The amended bill alleged that the acts of the city impaired the obligation of its contract and deprived the plaintiff of its security without due process of law, contrary to the constitution of the United States. The prayer also asked that the waterworks company be de-

creed to perform its contract with the city, that thereby the rights of bondholders might be saved.

It will be noticed that the case in question is in every particular like the case at bar. A suit had already been tried between the waterworks company and the city. The supreme court of Georgia, just as the supreme court of Kansas did in the case at bar, held the contract to be void.

Then, just as in the case at bar, the water company, like the electric light company in this case, hunted up its mortgagee, the result of which was the mortgagee sought, by making the city and the waterworks company defendants, to get into court because of diversity of citizenship. Just as in the case at bar, when they found the court would align the water company on the same side of the controversy with the mortgagee and oust the jurisdiction of the court, as an afterthought, they sought to have the court retain jurisdiction by alleging the impairment of a contract.

It is the case at bar all over. The supreme court of the United States realigned the parties and placed the water company on the same side of the controversy as the trust company and found that there were citizens of Georgia on both sides and held that there was no jurisdiction on the ground of diverse citizenship. It then held that the allegation simply amounted to a repudiation of a contract, and that the state of Georgia could not be said to have impaired the obligation of the contract when there was no allegation of any law having

been passed by the state authorizing or under the shadow of which the council could be acting. That the acts of the council in passing the resolutions and ordinances and denying the contract amounted to nothing more than a repudiation of the contract and that the court had no jurisdiction because of lack of a federal question.

We think on this case alone, if there were no others, that the court did right in sustaining our demurrer for lack of jurisdiction. In speaking upon the question, the supreme court of the United States, by Mr. Justice Holmes, said:

"We are of the opinion that the bill should have been dismissed for want of jurisdiction. The waterworks company is admitted to have been a necessary party, and it, like the defendant city, was a Georgia corporation. It was made a defendant, but the court will look beyond the pleadings, and arrange the parties according to their sides in the dispute. When that is done it is obvious that the waterworks company is on the plaintiff's side, and was made a defendant solely for the purpose of reopening, in the United States court, a controversy which had been decided against it in the courts of the state. There was a pretense of asking relief against it, as we have stated, but no foundation for the prayer was laid in the allegations of the bill. On the contrary, it appears from those allegations that the waterworks company insisted on its contract with the city, and did everything in its power to carry the contract out. It also recognized the plaintiff's right to receive the rentals, and yielded to its demand. No difference or collision of interest or action is alleged or

even suggested. If we assume that the plaintiff is more than an assignee of the city's contract to pay (which we do not intimate), still when the arrangement of the parties is merely a contrivance between friends for the purpose of founding a jurisdiction which otherwise would not exist, the device cannot be allowed to succeed. See Removal Cases (Meyer v. Delaware R. Constr. Co.) 100 U. S. 457, 469, 25 L. ed. 593, 598; Hawes v. Oakland (Hawes v. Contra Costa Water Co.) 104 U. S. 450, 453, 26 L. ed. 827, 829; Detroit v. Dean 106 U. S. 537, 541, 27 L. ed. 300, 302, 1 Sup. Ct. Rep. 560; Doctor v. Harrington, 196 U. S. 579, ante 606, 25 Sup. Ct. Rep. p. 355, Act March 3rd, 1875 (18 Stat. at L. 472, chap. 137, 5 U. S. Comp. Stat. 1901, p. 508).

"The attempt, by an afterthought, to give jurisdiction by setting up constitutional rights, must also fail. The bill presents a naked case of breach of contract. The first step of the city was to repudiate the contract and refuse to pay. Whatever it may have done subsequently, its wrong (if according to the decision of the supreme court of the state, there was a wrong,) was complete then. The repudiation and refusal were kept up until the bill was filed, and the other acts were subsequent, subordinate to, and in aid of them. The mere fact that the city was a municipal corporation does not give to its refusal the character of a law impairing the obligation of contracts, or deprive a citizen of property without due process of law. That point was decided in St. Paul Gaslight Co. v. St. Paul, 181 U. S. 142, 150, 45 L. ed. 788, 792, 21 Sup. Ct. Rep. 575."

City of Dawson v. Columbia Avenue Saving Fund Safe Deposit, Title & Trust Company, U. S. 49 L. ed. 713. Opioion 716.

V.

FIFTH:—THE COURT OF LAST RESORT OF A STATE HAS THE RIGHT, AUTHORITY AND POWER, TO CONSTRUE THE LAWS OF THE STATE AND TO CONSTRUE ANY CONTRACT ENTERED INTO UNDER SUCH LAW, AND THE FERERAL COURTS ARE BOUND BY SUCH CONSTRUCTION OF BOTH LAW AND CONTRACT NO MATTER HOW ERRONEOUS THE DECISION OF THE STATE COURA MAY BE. THE SUPREME COURT OF THIS STATE HAVING HELD THAT PORTION OF THE DEXTER FRANCHISE OR CONTRACT UNDER WHICH COMPLAINANT CLAIMS THE RIGHT OF THE LIGHT AND POWER COMPANY TO CONTINUE OCCUPYING THE STREETS OF THE CITY OF CLAY CENTER WITH ITS POLES AND WIRES, TO BE *ULTRA VIRES* AND VOID, SUCH DECISION OF SAID COURT IS FINAL ON SUCH SUBJECT AND THIS COURT IS ABSOLUTELY BOUND BY THE SAME.

In both the amended bill and second amended bill the decision of the supreme court of the state of Kan-

sas heretofore set out, is relied upon to give the federal court jurisdiction. There is an attempt to allege that this decision and judgment of the court impairs the obligation of the Dexter contract and that it in some way deprives this complainant of its property without due process of law and denies to it the equality of the law. Right here is might be well to see what it was that the Kansas supreme court decided. In its opinion or rather in the statement of facts upon which it based its opinion, the supreme court said it was passing upon section 1,000 of the general statutes of 1901. Said section reads as follows:

"The council may provide for, and regulate the lighting of the streets and the erection of lamp posts and the numbering of the buildings in the city and the construction of sewers, and the council shall have power to make contracts with any person, company or association for furnishing light for the streets, lanes or alleys of said city for any length of time not exceeding twenty-one years."

It was under this section that the Dexter franchise was granted and the supreme court simply decided that under said section a franchise could be granted for only twenty-one years. That the limitation in said section amounted to an absolute prohibition to attempt to grant a franchise for a longer period than twenty-one years, and further held that being without authority to grant the franchise for a pediod exceeding twenty-one years, it was likewise powerless to impose a valid burden upon the city as a penalty for refusing to do the act which

the statute prohibited it from agreeing to do. It, therefore, held that the council could not bind a future council to renew the franchise, neither could it bind the city to purchase the plant at the end of twenty-one years in case it failed to renew the franchise. The judgment was that that portion of the ordinance which required the city to do these things was beyond the powers of the city *ultra vires* and void, and, therefore, could not be specifically enforced. This is the sum total of the decision of the supreme court of Kansas. It doesn't even mention the rights of the Clay Center Light & Power Company in future to occupy the streets with its poles and wires nor even intimate that anybody has any right to destroy or interfere with the same. The supreme court was passing upon a statute and giving its construction to a statute which was in existence more than a year before the franchise was granted. Under such circumstances the decision of the supreme court of Kansas is absolutely binding upon this and every other court. It no where conflicts with any provision of the constitution of the United States or of any law thereof and we might say even if it did the remedy would have been a writ of error from this court to the supreme court of the state of Kansas, under section 709 of the Judiciary Act. So that the court can have it directly before it without referring back, we again set out in full the decision of the supreme court of Kansas. It is as follows:

"Many important and interesting questions have been ably and exhaustively discussed by counsel both

in the briefs and oral argument; but we have concluded the case can be disposed of by the decision of a single question, and will, therefore, consider nothing further. It will be seen that the statute which conferred authority upon which this franchise was granted expressly limits the duration of such a grant to twenty-one years. It is needless, therefore, to inquire what power the city might have had with respect to providing lights for the streets, lanes and alleys, and for the use of the inhabitants, under the general welfare clause of its charter, in the absence of a statute upon that subject, nor what right it might have had under the general welfare clause and this statute taken together, if the restrictive clause had been omitted. The limitation against granting such a franchise for a period not exceeding twenty-one years amounts to an absolute prohibition, which is conclusive upon the city and all other persons. Both of the parties to this franchise were bound to take notice of the law under which they acted, and must be held to have contracted with reference thereto. The city council, when the ordinance in question was enacted being without authority to grant the franchise for a period exceeding twenty-one years, was likewise, powerless to impose a valid burden upon the city as a penalty for refusing to do the act which the statute prohibited it from agreeing to do. *That which the city was forbidden to do directly it could not accomplish by evasion and indirection.* The evident purpose of the limitation placed upon the continuance of franchises of this kind was to give cities at reasonable intervals an opportunity to revise the provisions thereof, and thereby secure by the terms of a new contract such advantages as might result from the growth of the city and the consequent increased appliances for lighting plants, or otherwise. The language here used is: 'If at the expiration of twenty-

one years the city shall refuse to grant a further continuance of these privileges the city shall purchase, etc.' This completely deprives the city of an opportunity to stipulate for any change in the terms or conditions of the contract and enforces a perpetuation of the old franchise, however disadvantageous its provisions might be to the city. In this indirect manner the object of the statute is rendered nugatory. This provision of the statute presents a complete bar to the enforcement of this provision of the contract. These propositions are too familiar and elementary to justify the citation of authorities in their support.

"The judgment of the district court is reversed with instructions to enter judgment for costs in favor of the city."

City of Clay Center, et al., v. Clay Center Light & Power Co., 97 Pac. 377.

Let us call attention briefly to another decision of this court. This case came up to the supreme court by writ of error to the court of appeals of New York. It was claimed that the decision of the court of appeals of New York refused to give effect to a valid contract, and that therefore it impaired its obligation; but this court held that it was not deprived of its property without due process of law; that the decisions of the court of appeals of New York upon the existing laws of the state of New York and contracts made thereunder were absolutely binding upon the federal court. In passing upon it, the court said:

"Nor are we authorized by the Judiciary Act to

review the judgment of the state court, because this judgment refuses to give effect to a valid contract or because such judgment in its effect impairs the obligation of a contract. If we did, every case decided in the state courts could be brought here, when the party setting up a contract alleged that the court took a different view of its obligations from that which he held."

Morley v. Lake Shore & Michigan Southern Railway Co., U. S. Law ed., 36, page 92. Opinion 930.

Let us now direct the court's attention to the case of Lehigh Water Co. vs. Borough of Easton. As in this case it was claimed that a law of the state of Pennsylvania and a decision of the supreme court of Pennsylvania interpreting such law impaired the obligation of a contract. As in this case the law interpreted by the supreme court was in existence at the time the contract was made. It was insisted that this court should review the judgment of the supreme court of Pennsylvania because the same impaired the obligation of a contract. This court held that no matter how erroneous it might believe the decision and judgment of the state court to be so long as it was that court's construction of a law WHICH WAS IN EXISTENCE AT THE TIME THE CONTRACT WAS MADE it was final and binding upon this court. The court, speaking through Mr. Justice Harlan, said:

"The argument in behalf of the company seems to rest upon the general idea that this court, under the

statutes defining its appellate jurisdiction, may re-examine the judgment of the state court in every case involving the enforcement of contracts. But this view is unsound. The state court may erroneously determine questions arising under a contract which constitutes the basis of the suit before it; it may hold a contract void which in our opinion is valid; it may adjudge a contract tract to be valid, which in our opinion is void; or its interpretation of the contract may in our opinion be radically wrong; but in neither of such cases would the judgment be reviewable by this court under the clause of the constitution protecting the obligation of contracts against impairment by state legislation, and under the existing statutes defining and regulating its jurisdiction, unless that judgment in terms or by its necessary operation gives effect to some provision of the state constitution, or some legislative enactment of the state, which is claimed by the unsuccessful party to impair the obligation of the particular contract in question."

Lehigh Water Co. v. Borough of Easton, U. S. Law ed. vol. 30, page 1059. Opinion 1060.

Let us now cite the court to the case of Thompson vs.The State of Kentucky, decided by this court. The executive officers of the state of Kentucky gave an interpretation to a law of the state. Under this interpretation a party entered into a certain contract. The court of last resort gave a different interpretation from that given by the executive officers. It was insisted that this decision of the state court of Kentucky impaired the obligation of the contract and deprived the party of his property without due process of law. This

court held that due process of law as meant by the constitution of the United States did not assure the taxpayer the correct interpretation of the law by its executive officers or by its courts nor against the consequences of a misinterpretation by either or both. In deciding the question among other things this court said:

"But from this situation, this court cannot give relief. Due process of law does not assure to a taxpayer the interpretation of laws by the executive officers of a state as against their interpretation by the courts of the state, or relief from the consequences of a misinterpretation by either. We do not mean to indicate that the decision of the court was wrong. It would, indeed, be difficult to resist the force of its reasoning. At any rate, it is the province of the courts to interpret the laws of the state, *and he who acts under them must take his chance of being in accord with the final decision.* And this is the hazard under every law, and from which or the consequences of which we know of no security."

Thompson v. Kentucky, U. S. Law ed., vol. 52, page 822.

In the amended bill and also in the second amended bill one of the principal grounds relied upon to give the circuit court jurisdiction is the allegation that the judgment of the supreme court of Kansas heretofore referred to, deprived complainant of its security without due process of law and also impaired the obligation of the Dexter contract. The court will notice in reading the decision of the supreme court of Kansas that

the only statute passed upon was section 1000 of the general statutes of 1901. It was passed by the legislature in 1885 AND WAS IN EXISTENCE AT THE TIME THE DEXTER FRANCHISE WAS PASSED.

Let us now call the court's attentoon to a decision of this court that squarely holds that such a law cannot impair the obligation of a contract and that a decision of the court upon a statute in existence at the time the contract was entered into cannot be regarded as a law or act of the state impairing the obligation of a contract. In the case referred to, the circuit court dismissed the bill for want of jurisdiction, and like the case at bar, the appeal was taken on the jurisdictional question alone. In passing upon the question this court said:

"The bill proceeds upon the ground that the orders of the probate court resulting in the sale of the land in controversy as the property of Franklin and in the convelance of 1888 to the defendant Davies impaired the obligation of the alleged contract with the territory as evidenced by the deed of 1878 to Thaddeus Hanford. BUT IT WAS NOT ALLEGED IN THE BILL THAT THE PROCEEDINGS IN THE PROBATE COURT WERE HAD UNDER ANY STATUTE THAT WAS REPUGNANT TO THE CONSTITUTION OF THE CONSTITUTION OF THE UNITED STATES OR WHICH WAS ENACTED AFTER THE SALE OR CONVEYANCE OF THESE LANDS BY THE TERRITORY TO

THADDEUS HANFORD. The prohibition upon the passage of state laws impairing the obligation of contracts has reference only to the laws, that is, to the constitutional provisions or o the legislative enactments of a state and NOT TO JUDICIAL DECISIONS OR THE ACTS OF STATE TRIBUNALS OR OFFICERS UNDER STATUTES IN FORCE AT THE TIME OF THE MAKING OF THE CONTRACT, THE OBLIGATION OF WHICH IS ALLEGED TO HAVE BEEN IMPAIRED."

Frank Hanford v. Griffith Davies, et al., U. S. Law ed., vol. 41, page 157. Opinion 159.

VI.

SIXTH:—BEFORE A COURT CAN TAKE *ORIGINAL JURISDICTION* IT MUST CLEARLY APPEAR FROM THE ALLEGATIONS OF THE BILL THAT THE CASE IS ONE ARISING UNDER THE CONSTITUTION OR LAWS OF THE UNITED STATES. THE MERE FACT THAT IT IS ALLEGED THAT SOME LAW OF THE STATE IS IN CONFLICT WITH THE CONSTITUTION OR SOME LAW OF THE UNITED STATES WILL NOT GIVE THE FEDERAL COURT ORIGINAL JURISDICTION BECAUSE THE PRESUMPTION IS THAT THE STATE

COURTTS WILL ARRIVE AT A CORRECT DECISION AND IF THE STATE COURT ERRS IN THIS THE REMEDY IS BY WRIT OF ERROR UNDER SECTION 709 OF THE REVISED STATUTES OF THE UNITED STATES.

In this case we are dealing with the question of the *original jurisdiction* of the circuit courts of the United States. The sole question for this court to consider and decide is whether or not the allegations in the second amended bill together with references therein to the amended bill and original bill are sufficient to show that this is a case arising under the constitution or laws of the United States. If the allegations are not sufficient, then the circuit court was correct in sustaining the demurrers and dismissing the bills, and this court should either dismiss this appeal or affirm the decision of the court below. The judiciary act of 1887, as amended in 1888, gives the circuit courts of the United States *original* jurisdiction only in cases of a civil nature at common law or in equity where the matter in dispute, exclusive of interest and costs, exceeds the sum of two thousand dollars and WHICH ARISE UNDER THE CONSTITUTION OR LAWS OF THE UNITED STATES OR TREATIES MADE UNDER THEIR AUTHORITY, ETC. It follows then that unless the case at bar is one arising under the constitution of the United States the court below had no jurisdiction.

The statute does not say that in all cases where the constitution, laws or treaties of the United States may be drawn in question in any way that the suit may be brought *originally* in the federal courts. The suit must arise under the constitution or laws of the United States.

The question then arises how shall one proceed in a case where the interpretation or construction of a constitutional provision of the United States or the construction of a law or treaty of the United States is drawn in question when, the suit itself does not arise from and is not based upon the constitution or laws of the United States. The congress provided for this class of cases at an early day by the adoption of section 709 of the Judiciary Act. Such section provides that when these federal questions are drawn in question in a suit in the state courts and the court of last resort of the state shall decide against the claim under the constitution or laws of the United States, then and in that case the party aggrieved may take the case to the supreme court of the United States by writ of error. Said section 709 reads as follows:

"A final judgment or decree in any suit in the highest court of a state, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the

constitution, treaties or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege or immunity is claimed under the constitution, or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed, by either party, under such constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the supreme court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States.

The supreme court may reverse, modify, or affirm the judgment or decree of such state court, and may, at their discretion, award execution, or remand the same to the court from which it was removed by the writ."

The weight of authority seems to indicate that before the circuit court of the United States can be held to have original jurisdiction of a suit, it must be a case founded upon and, therefore arising under the constitution or laws of the United States. When the suit or action is based upon, or in other words, arises under the constitution or laws of the United States, it may then be brought originally in such court, and the court may then pass upon such federal law and such federal constitution. In all other instances the state court has original jurisdiction and not the federal court. The question may be asked if indirectly or otherwise, by plea, answer or

reply, the correct interpretation of a law, treaty or constitution is drawn in question, how may the party claiming the protection of such treaty, law or constitution get the case before the federal court in order to have the federal court pass upon such question. The only way this can be done is to have the court of last resort of the state pass upon the question, and if it sustains the law of the state, which impairs the obligation of a contract, or decides against the claim under a treaty the proper proceeding is by writ of error from the supreme court of the United States to the state court commanding the records to be sent to the supreme court, and the supreme court itself will then settle all such questions. This was the object in passing section 709 of the judiciary act above set out.

The question is, then, when does a suit arise under the constitution of the United States? We think we can give a case that clearly illustrates the kind of cases of which the federal court has original jurisdiction. Recently the congress passed a law requiring all cars used in inter-state traffic to be equipped with automatic couplers and made it negligence *per se* for any railroad company to use a car without being so equipped. Now suppose a brakeman should be injured by a car being used in inter-state traffic by reason of its not being so equipped. A suit brought to recover damages by an injured man would be a suit arising under the laws of the United States. In such a case it would be the law of the United States that gave him the right and his case would, therefore, be based upon and arise

because of the statutes of the United States, and would be one arising under its laws.

In the case at bar a party claims a right based upon the laws of the state of Kansas and upon an ordinance of a city in such state claiming that his right granted to him by virtue of such law and such ordinance has been impaired by the passage of another law by the state of Kansas. This would amount in the language of section 709 of the Judiciary Act to a case where "Is drawn in question the validity of a statute of the state on the ground of its being repugnant to the constitution of the United States," and in order to have this question determined by a federal court section 709 must be complied with and such party can only get to a federal court by raising the question in the state court and when the court of last resort of the state shall have decided the constitutional question against him and in favor of the validity of the state law he must take the case to the supreme court of the United States by writ of error.

In support of this proposition we will now call the attention of the court to a decision of this court in which the opinion was written by Chief Justice Fuller. The city of New Orleans was largely in debt. It had many outstanding warrants. Subsequent to the issuing of the warrants or bills sued upon the legislature of the state of Louisana passed an act repealing the statutes under which proper levies could be made to pay the indebtedness of the city, and left the city without

any law under which such levies could be made. The allegations were that this law impaired the obligation of a contract. This court held that where the claim is that a state has passed a law impairing the obligation of a contract the only way to get the case into the federal court is by writ of error under section 709 of the Judiciary Act, and that before it can be taken to a federal court the question as to the validity of the statute, and as to its impairment of the obligation of a contract MUST FIRST BE PASSED UPON BY THE STATE COURT. In passing upon the question Chief Justice Fuller said:

"The judicial power extends to all cases in law and equity arising under the constitution, but these are cases *actually* and not *potentially* arising, and jurisdiction cannot be assumed on mere hypothesis. In this class of cases it is necessary to the exercise of original jurisdiction by the circuit court that the cause of action should depend upon the construction and application of the constitution, and it is readily seen that cases in that predicament must be rare. *Ordinarily the question of the repugnancy of a state statute to the impairment clause of the constitution is to be passed upon by the state courts in the first instance. The presumption being in all cases that they will do what the constitution and laws of the United States require* (Chicago & A. *R. Co. v. Wiggins Ferry Co.*, 108 *U. S.* 18 27, 635) AND IF THERE BE GROUND FOR COMPLAINT OF THEIR DECISION, THE REMEDY IS BY WRIT OF ERROR UNDER SECTION 709 OF

THE REVISED STATUTES. CONGRESS GAVE ITS CONSTRUCTION TO THAT PART OF THE CONSTITUTION BY THE TWENTY-FIFTH SECTION OF THE JUDICIARY ACT OF 1879, AND HAS ADHERED TO IT IN SUBSEQUENT LEGISLATION."

City of New Orleans v. B. W. Benjamin et al., U. S. L. ed. 38, 764. Opinion 769.

The above case was approved by this court at a later date in the case of Defiance Water Co. v. The City of Defiance. Here the allegation in the petition was that a resolution and an ordinance of the city impaired the obligation of its contract created by another ordinance. A temporary injunction had been granted by the state court. In its petition to remove the water company alleged that if it were perpetually enjoined as prayed in the suit in the state court, the state would thereby have deprived it of its property without due process of law. The circuit court to which it was removed sustained jurisdiction on the ground that the case arose under the constitution of the United States and proceeded to render a decree finding, however, against the removing party on the merits. This court, however, would not allow this judgment to stand because it wanted to emphasize the fact that a suit must actually arise under the constitution or laws of the United States in order to give the federal court jurisdiction

originally or by removal. It sent the case back to the circuit court and ordered it to be dismissed for want of jurisdiction. In rendering its opinion it quoted all of that part of the opinion in the New Orleans case above set out. In addition to quoting as above mentioned, the court said:

"Nor does the contention that if the temporary injunction granted by the court of common pleas should ultimately be made perpetual justify the assumption of jurisdiction because of the violation of the fourteenth amendment.

Litigation in the state courts cannot be dragged into the federal courts at such a stage and in such a way. The proposition is wholly untenable that, before the state courts in which a case is properly pending can proceed to adjudication in the regular and orderly administration of justice, the courts of the United States can be called on to interpose on the ground that the state courts might so decide as to render their final action unconstitutional.

"Moreover,, the state courts are perfectly competent to decide federal questions arising before them, and it is their duty to do (194) so. Robb v. Connolly, 111 U. S. 624, 637, 28 L. ed. 542, 546, 4 Sup. Ct. Rep. 544; Missouri P. R. Co. v. Fitzgerald, 160 U. S. 556, 583, 40 L. ed. 536, 16 Sup. Ct. Rep. 389.

"And, we repeat, the presumption is in all cases that the state courts will do what the constitution and laws of the United States require. Chicago & A. R. Co. v. Wiggins Ferry Co., 108 U. S. 18, 27 L. ed. 589, 9

Sup. Ct. Rep. 210; Neal v. Delaware, 103 U. S. 370, 389, 26 L. ed. 567, 571; New Oorleans v. Benjamin, 153 U. S. 411, 424, 38 L. ed. 764, 769, 14 Sup. Ct. Rep., 905.

"IF ERROR SUPERVENES, THE REMEDY IS FOUND IN P. 709 OF THE REVISED STATUTES. (U. S. COMP. STAT. 1901, P. 575)."

Defiance Water Co. v. Defiance, U. S. L. ed. 48, 144. Opinion 143-144.

A contract that fits the case at bar all over on this question is that of the city of Shreveport v. Cole et al., executors. The action was brought in the circuit court for the western district of Louisiana. The allegation in the bill of complaint upon which the jurisdiction of the federal court was grounded were as follows:

The city of Shreveport under certain contracts owed the plaintiff some forty-seven thousand dollars. The city had no funds with which to pay. Subsequent to contracting this debt, the state of Louisana adopted a new constitution in which the power of taxation of all cities for all purposes was limited to ten mills on the dollar. It required every particle of the levy to pay the current expenses of the city. It would, therefore, be impossible for the city to levy taxes to pay such claim of forty-seven thousand dollars. It was alleged that the city had no property which could be seized under execution and no revenue except such as were derived

from the taxation. That if said constitutional provision was held to be valid, no means existed under the law of Louisiana by which a judgment could be enforced. Then follows the following allegations:

"Petitioners allege that article 208 so far as the same limits municipal taxation is as to them null and void because it violates the tenth section of the first article of the constitution of the United States which prohibits the state of Luisiana from passing any law impairing the obligation of a contract.

"That they are entitled to have said article 208 of the constitution of the state of Louisiana declared null and void so they may have some remedy by means of which to cmpel said city to pay its indebtedness to them. That the case herein presented arises under the constitution of the United States and that your honorable court has jurisdiction thereof."

The above allegations are almost identical with the allegations in the second amended bill in the case at bar. The allegations in the bill in this case are not so strong as the allegations above cited, because in this case there is no allegation that the case arises under the constitution of the United States. The supreme court in an opinion by Chief Justice Fuller reversed the judgment of the circuit court which had retained jurisdiction and and remanded the case to the circuit court to dismiss the case for want of jurisdiction. In passing upon the questoon the court, through Chief Justice Fuller, among other things said:

"Unless this suit was one arising under the constitution or laws of the United States, the circuit court had no jurisdiction; and if it did not really and substantially involve a dispute or controversy as to the effect or construction of **the constitution or some law,** upon the determination of which the recovery depended, then it was not a suit so arising. Starin v. New York, 115 U. S. 248, 257 (29:388, 390); Little York Washing & Water Co. v. Keyes, 96 U. S. (24:656).

"The case at bar was in effect an action at law to recover a balance alleged to be due the petitioners or plaintiffs upon a contract with the defendant, and the maintenance of the cause of action involved no federal question whatever, nor is any such indicated in the judgment rendered. But the jurisdiction seems to have been rested upon the averments in plaintiff's petition, that under article 209 of the state constitution of 1879, providing that 'No parish or municipal tax for all purposes whatever shall exceed ten mills on the dollar of valuation, the city of Shreveport, being so situated as to need all the revenue from such a tax, cannot raise funds to pay its just debts; that, therefore, plaintiffs are deprived by that article, 'if the same be valid and operative,' of the remedy of enforcing payment by the levy of taxes, although their contract was entered into in 1871; and that so said article impairs the obligation of such contract. This contention, however, required the circuit court to assume that the courts of Louisiana would hold that the city could lawfully avail itself of the constitutional limitation in question as a defense to the collection by taxation of the means to liquidate the indebtedness, notwithstanding that would be to apply it retrospectively, to the destruction of an essential rem-

edy existing when the contract was entered into; *whereas, the presumption in all cases is that the courts of the states will do what the constitution and laws of the United States require.* Chicago & A. R. Co. v. Wiggins Ferry Co., 108 U. S. 18 (27:636); Neal v. Del. 103 U. S., 370, 389, (26:567, 571)."

In addition to the above and referring directly to the allegation that the constitution of Louisiana impaired the obligation of the contract, Mr. Justice Fuller says:

"CONSTITUTIONS AS WELL AS STATUTES ARE CONSTRUED TO OPERATE PROSPECTIVELY ONLY UNLESS ON THE FACE OF THE INSTRUMENT THE CONTRARY INTENTION IS MANIFEST BEYOND REASONABLE QUESTION."

Right here we ask the court to turn to page 52 of this brief and read the law of Kansas of 1905 set out in the second amended bill. The law speaks for itself. Instead of showing on its face that it was the intention of the legislature that it should operate retrospectively, it clearly shows that it was the intention that it should operate prospectively only. It does not relate to contracts previously made or to franchises previously granted. It therefore follows that the above law settles the question that such a law can not be set up as a law impairing the obligation of a contract; and can not be

invoked to give a federal court original jurisdiction.

Again the court says:

"When(in the instance of a judgment rendered on contract in a state court, remedies for its collection existing at the time of the making of the contract are taken away, in substance, by state constitution or statute, and the deprivation enforced by the final judgment of the state courts, A WRIT OF ERROR UNDER SECTION 709 OF THE REVISED STATUTE ENABLES THIS COURT TO VINDICATE THE THE SUPRREMACY OF THE CONSTITUTION AND LAWS OF THE UNITED STATES AND ADMINISTER THE PROPER REMEDY; but had this record in its present shape come before us in that way even, we should have had no alternative save to dismiss the writ."

City of Shreveport v. Cole, reported in L. ed., vol. 32-589. Opinion 591-592.

Upon the subject as to when a suit is one arising under the constitution or laws of the United States, we desire to call the court's attention to the case of New Orleans Railway Co. v. The State of Mississippi. Prior to the enactment of the judiciary act of 1887-1888, either the plaintiff or defendant could remove a suit from a state court to the federal court when the suit was one arising under the constitution or laws of the United States at any time before trial.

The state brought a suit in the state

court to compel the railway company to remove a bridge across a navigable river. The defense was that the bridge was placed there or rather the right to place it there was given by an act of congress of the United States. It filed a petition for removal in which it alleged that its right to maintain the bridge was authorized by an act of congress approved March 2, 1868. That the railway over said bridge was a United States post rost road over which the mails of the United States were being carried. The state court refused to remove the case. In this it was sustained by the supreme court of Mississippi and it came up to this court upon a writ of error to the supreme court of Mississippi. This court held that the defendant had a right to remove the case because it founded its defense on the fact that the very subject of the action, to-wit, the right of the defendant company to build and maintain the bridge arose out of a law of the United States giving the company the right to build it. In other words the very subject of the case, the right to maintain the bridge, grew out of, was created and brought into being by a law of the United States. At that time defendant's having a right to remove a case by showing that it was one arising under the constitution or laws of the United States, at any time before trial, the court held that from the answer of defendant and the petition for removal it was a case arising under a law of the United States. In this case, however, Mr. Justice Miller was so strongly of the opinion from the plain reading of the statute that

the suit was not one founded upon or growing out of the constitution or laws of the United Statesc, that he even dissented from the opinion that the defendant could remove even though it alleged that its right to maintain the bridge arose directly from and because of a law of the United States. The whole court united in the opinion that the suit must be one arising under the constitution, that is to say, that the right or claim in the suit must be founded upon the constitution or laws of the United States. The majority of the court held under the old law giving the defendant the right to remove at any time before trial, that when the answer and the petition for removal showed that the defense or the right claimed by the defense was directly based upon a law of the United States that a removal could be had. Judge Miller, however, was of the opinion that the case could not be removed, and that the federal court had no jurisdiction because the *suit itself* as brought by the plaintiff was not necessarily one arising under a law of the United States. In speaking on this question, Mr. Justice Miller said:

"Taking the idea of a 'suit' as thus defined, what is meant by the suit arising under a law of congress? The obvious answer seems to be that the cause of action is founded on the act of congress; that the remedy sought is one given by an act of congress; that the relief which is prayed is a relief dependent on an act of congress; that the right to be enforced in the suit is a right which rests upon an act of congress. In all this I see no place for holding that the defense to a suit not

so founded on an act of congress, or a plea which the defendant may interpose to any ordinary action, though that plea be founded on an act of congress, is a suit arising under an act of congress.

"Looking also to the reasons which may have influenced congress, it may well be supposed that while it intended to allow the removal of a suit into the courts of the United States, where the very foundation and support thereof was a law of the United States, it did not intend to authorize a removal where the cause of action depended solely on the law of the state, and when the act of congress only came in question incidentally as part (it might be a very small part) of defendant's plea in avoidance. In support of this view, it may be added that a defendant in such case is not without remedy in a federal court; for if he has pleaded and relied on such defense in the state court, and that court has decided against him in regard to it, he can remove the case into this court by writ of error and have the question he has thus raised decided here, by the highest court of the United States."

New Orleans, Mobile & Texas Railroad Co. v. The State of Mississippi, 12 Otto. 144. Law ed. 26, 96.

In the judiciary act of 1887-1888, before a circuit court of the United States can take jurisdiction originally the complainant or plaintiff, as the case may be, must bring upon the record in his pleading the facts and circumstances showing that the suit is one arising under the constitution or laws of the United States. Under the law as it now stands before a defendant can

remove a case from a state court to the circuit court f the United States, he must show to the court that the suit brought by the complainant is one arising under the constitution or law f the United States and this must appear from the suit brought by the complainant. If the bill fails to show that it is such a suit, then no removal can be had. This change was made in the judiciary act of 1887-1888, and this court in the case of State of Tennessee vs. The Bank of Commerce was of the opinion that the change by congress was made and brought because of the forcible language used by Mr. Justice Miller above set out. In that case this court said:

"Congress, in making this change, may well have had in mind the reason which so eminent a judge as Mr. Justice Miller invoked in support of his dissent from the original decision that a defense under the constitution, laws or treaties of the United States was sufficient to justify a removal by the defendant under the act of 1875. 'Looking' said he, 'to the reasons which may have influenced congress, it may well be supposed that while that body intended to allow the removal of a suit where the very foundation and support thereof was a law of the United States, it did not intend to authorize a removal where the cause of action depended solely on the law of the state, and when the act of congress only came in question incidentally as part (it might be a very small part) of the defendant's plea in avoidance. In support of this view, it may be added, that he in such case is not without remedy in a federal court; for if he has pleaded and relied on such

defense in the state court, and that court has decided against him in regard to it, he can remove the case into this court by writ of error, and have the question he has thus raised decided here."

> State of Tennessee vs. The Bank of Commerce, et al., U. S. Law ed. 38, 511. Opinion 514, col. 2.

On this subject we desire to direct the attention of the court specially to the case of Carson v. Dunham, decided by this court. The case was an appeal from the circuit court of the United States for the district of South Carolina. The circuit court remanded the case to the state court from which it had been removed, and an appeal was taken to this court from such order. It was claimed that the suit was one arising under the constitution of the United States. In passing upon the question this court said:

"Before considering further this branch of the case it is proper to notice the difference between the provisions of the act of 1875 for the removal of suits presenting federal questions, and those in section 709 of the revised statutes for the review by this court of the decisions of the highest courts of the states. Under the act of 1875, for the purpose of removal, the suit must be one "arising under the constitution or laws of the United States, or treaties made or which shall be made under their authority;" that is to say, the suit must be one in which the recovery depends will be defeated by one construction of the constitution, or a law or treaty of the United States, or sustained by a contrary construction. Starin v.

New York City, 115 U. S. 257 (29:390), and cases there cited. But under section 709 there may be a review by this court of the decisions of the highest courts of the states in suits "where any title, right, privilege or immunity is claimed under the constitution, or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed by either party under such constitution, treaty, statute, commission or authority." *For the purposes of removal the constitution, or some law or treaty of the United States must be directly involved, while for the purposes of review it will be enough if the right in question comes from a "commission held, or an authority exercised, under the United States.' Cases, therefore, relating to the jurisdiction of this court for review are not necessarily controlling in reference to removals.'"*

Carson v. Dunham, U. S. Law ed. 30, 992.

The above case so clearly points out the difference between the allegations and facts necessary to give a federal court *original* jurisdiction and those necessary to give this court the right to review a decision of the court of last resort of a state that it is specially applicable to the question at bar. It distinctly lays down the rule that in order to remove a case from a state to a federal court SOME LAW OR TREATY OF THE UNITED STATES MUST BE DIRECTLY INVOLVED while for the purpose of review it will be enough if the right in question comes from a "commission or an authority exercised under the United

States." The quotation just made above, the court makes from section 709 of the judiciary act. The same grounds, facts and circumstances must be alleged to give the court original jurisdiction that is necessary for removal; so in this case, paraphrasing the language of the court, we might say that while to give the court jurisdiction originally, some law or treaty of the United States must berectly involved while for the purpose of review it will be enough "if there is drawn in question the validity of a statute or authority exercised under any state on the ground of their being repugnant to the constitution, treaty or laws of the United States.

In the case at bar, the suit is founded upon a law of Kansas, passed in 1885, and the franchise granted to one Dexter under and by virtue of that law and the allegations of the bill simply *cal in question* another law of the state of Kansas passed in 1905 as being repugnant to the constitution of the United States so that under the above decision, while this might give the right to review a case of this kind by writ of error to the supreme court of Kansas, a federal court would not have original jurisdiction. Most of the cases decided by this court where it is held that the fact that it is claimed that some law is in conflict with the constitution of the United States raises a federal question and gives a federal court jurisdiction, are cases taken to this court by writ of error to the court of last resort of the state to bring up for review the decision of such court. In the opinion of this court above quoted, such cases *relating to the jurisdiction of this court for review are not neces-*

sarily controlling in reference to removal.'

In defining when a case arises under the constitution of the United States, the supreme court of Connecticut says:

"That a case may arise under the constitution and laws of the United States, it need not be of an unmixed character. If the principle right, the right of property in the subject in controversy IS GIVEN OR CREATED BY AN ACT OF CONGRESS MADE IN PURSUANCE OF THE CONSTITUTION, IT IS SUFFICIENT."

McGill v. Parsons, 4 Conn., 317.

In the Bank of the United States v. Roberts, in defining acts or cases which arise under the constitution of the United States, the court said:

"Acts which arise under the constitution and laws of the United States must be understood to be those GROWING OUT OF, OR CREATED BY OR BROUGHT INTO BEING BY THE LAWS OF THE UNITED STATES."

2 Fed. Cas., 728.

In the case at bar, the right of the Clay Center Light & Power Company to maintain its poles and wires upon the streets of Clay Center being based upon, growing out of and as alleged, created by and being brought into being by an ordinance of the city of Clay Center passed in 1886 under and in pursuance and by

virtue of a statute of the state of Kansas, passed in 1885, it cannot be said that it is a case arising under the constitution or laws of the United States. It follows, therefore, that the court below was right in dismissing the bill for want of jurisdiction and this appeal should be dismissed or the judgment and decree of the court below affirmed.

It being only fair to the court below and to this court that this opinion of the court below should be printed in full in this brief, and as much of it is directly in point, under this head, we insert it in full. It is as follows:

In the Circuit Court of the United States for the District of Kansas, First Division.

The Merrimack River Savings Bank,
Complainant,
vs. No. 8767. Equity
The City of Cilay Center, et al.,
Defendants.

MEMORANDA OF DECISION DECISION ON DEMURRER TO AMENDED BILL OF COMPLAINT.

Complainant herein has filed and presented its original and amended bills of complaint, praying an injunction against defendant city, its mayor and members of its common council, restraining and prohibiting defendants from tearing down, removing or destroying

electric light poles, wires and appliances, the property of and used by defendant, the Clay Center Light & Power Company (hereinafter called the "Power Company") from the streets of the city, such appliances having been heretofore used by the owner in furnishing electric light and power to the inhabitants of said city, on which property complainant claims to hold a mortgage given by a former owner to secure payment of the sum of fifteen thousand dollars.

Against the bill, as amended, the defendant city, its mayor and members of its common council have lodged their demurrer, challenging the sufficiency of the averments therein contained, on two grounds; (1) Want of jurisdiction of this court; (2) Want of equity in the bill.

The decision of this demurrer requires a statement of the facts averred in the bill, as amended. These facts may be breifly summarized, as follows:

On the 22nd day of April, 1886, the city passed an ordinance granting a franchise and making a contract with one Dexter, his successors and assigns, to use the streets, alleys and ways of this city in the construction and operation of an electric light and power plant therein to furnish light and power to the city and its inhabitants, and contracting with the grantee of the franchise, his successors and assigns, to furnish light and power to the city at certain stipulated rates for a period of twenty-one years. Section 9 of this ordinance provides as follows:

"Term of Franchise. That the rights and privileges hereby granted are for a term of twenty-one years: Provided, the said Alonzo F. Dexter, his successors and assigns, shall begin the erection of said

electric light works within ninety days from the passage of this ordinance and shall complete the same and have the same in good working order within one year from the passage of thi ordinance; and Provided, further, that if at the expiration of twenty-one years the city shall refuse to grant a further continuance of these privileges the said city shall purchase said works at their appraised value, the same to be appraised by three disinterested electors of the state of Kansas, one of whom shall be chosen by the city, one by Alonzo F. Dexter, his successors and assigns, and the two so chosen shall select a third, and the amount agreed upon, upon their oath, by the three so chosen shal be the price to be paid therefor; and Prvided further, that the city of Clay Center shall have the right to revoke the privileges herein granted at any time if the said Alonzo F. Dexter, his successors and assigns, shall fail to fully comply with all the provisions of this ordinance."

The terms of the grant were accepted by Dexter and the plant constructed as stipulated therein. Thereafter Dexter conveyed all his rights in the property and franchise granted by the city to one Williamson, who, on the 2nd day of January, 1899, duly executed a mortgage averred by the complainant in its bills to cover the property comprising the plant, to secure the payment of a certain bond of even date therewith, due nineteen years after date, with interest thereon at the rate of two per cent per annum, payable semi-annually, as evidenced by coupons attached thereto. This mortgage was duly recorded in the appropriate office. Complainant is the owner and holder of this bond and mortgage by endorsements, for a valuable consideration, and the same remains wholly unpaid, including interest from January first, 1909.

The defendant Power Company subsequent to the

making of this mortgage became and now is the owner by purchase and conveyance from Williamson of all his ..ts in the property, including the grant made by the ..ty to Dexter, subject to the terms of the aforementioned mortgage. After the expiration of the period of twenty-one years stipulated in the ordinance the Power Company commenced its suit in the district court of Clay county, this state, to enforce against the city specific performance of the provisions contained in section 9 of the ordinance above quoted. This suit resulted at the trial in a decree in favor of the Power Company. However, on appeal, this decree was reversed and a decree denying relief to the Power Company was directed by the supreme court to be entered, that court holding as the contract had, according to its terms, expired by lapse of time, it was not valid or enforcible as a contract against the city to grant a continuance of the franchise or to purchase the property. 78 Kan. 390. To this suit complainant was not a party. Thereafter, the city, through its officials, threatening and being about to remove the poles, wires and other property of the Power Company from the streets, alleys and ways of the city, this suit was instituted by complainant to protect its security under its mortgage, it being averred the maker of the bond and mortgage, Williamson, is deceased, his estate settled and closed, and that the property described in the mortgage is the only security of complainant for the enforcement of its debt.

The contentions made by demurrants are: (1) That this court has no jurisdiction over the controversy presented by the bill as amended by reason of the diverse citizenship of the parties, because on a proper arrangement of the parties, according to their interest in the subject matter of the suit, the Power Company, a citizen of this state, must e aligned with complainant, a

citizen of New Hampshire, against demurrering defendants, citizens of this state; (2) When the parties are so aligned in accordance with their interest in the subject matter of the suit this court has no jurisdiction because there is no controversy involving the constitution and laws of the United States which may be determinative of the case.

The property threatened by defendant officials of the city, acting for the city, to be destroyed or removed from the streets of the city, is the property of the Power company in its possession and being used by it, in which complainant has only the interest of a lienor. It must, therefore, be assumed the Power Company has as much or more interest in its protection and conservation than has complainant, and that it will be as much or more benefitted by decree in favor of complainant than will complainant itself. Therefore, it must be true in a proper arrangement of the parties according to interest in the subject matter of the controversy, the Power Company must be aligned with complainant, and thus aligned this court has no jurisdiction of the controversy on the ground of diverse citizenship of the parties, unless complainant, bringing on this controversy and making the Power Company a party thereto on the record may now be heard to contend, as is argued in its brief, that the Power Company is not a necessary party to its bill of complaint, and therefore, the case may be preceeded with and determined by final decree as though the Power Company were not present. That the Power Company, the owner in possession and using the property sought by complainant to be protected by the decree prayed in its bill, is interested in the subject-matter of the suit, is apparent beyond dispute. If decree shall be entered against complainant in this suit based on rights asserted to have been granted by the

city to the grantor of both complainant an the Power Company, it is clear such decree would also, to the extent of such rights as are common to both, bind the Power Company, a party, and would not bind it if not a party to the controversy. Therefore, if the Power Company had not been made a party to the suit, or, if being a party before decree it shall be dismissed therefrom, its rights undetermined, that it will be at liberty to bring and prosecute its suit to obtain the exact character of relief sought by complainant in the protection of its individual rights in the property, must be conceded. It is, therefore, a necessary party to this suit. Consolidated Water Co. v. Babcock, 76 Fed. 243; Boston Safe-Deposit & Trust Co. v. City of Racine et al., 97 Fed. 817; Old Colony Trust Co. v. Atlanta Ry. Co. et al., 100 Fed. 798; Burnham v. Kempton, 37 N. H. 485; Story's Eq. Pl., chap. 4, sec. 72 and 76 a.

In Burnham v. Kempton *supra*, it is said:

"The rule is, that 'all persons materially interested in the subject ought generally, either as plaintiffs or defendants, to be made parties to the suit, or to be served with a copy of the bill.' 1 Dan. Ch. Pr. 240. It is necessary that the plaintiff should bring regularly before the court either as co-plaintiffs with himself, or as defendants, all persons so circumstanced, that, unless, their rights were bound by the decree of the court, they might cause future molestation or inconvenience to the party against whom the relief is sought; Ibid. 241; or, as it is better expressed in the margin, 'All having a right to sue the party for the same thing.' Story's Eq. P. 74, 136, etc.; 2 Swift's Sys, 248; Adamns' Eq. 312; Brightley's Eq. Jur. 418, sec. 537."

"It follows, the Power Company, being a neces-

sary party to the suit, united in interest with and not against complainant by the averments of the amended bill, and being a necessary party to a complete determination of the rights of the parties interested in the subject-matter of this suit, to the end that further litigation may cease, it must be held this court cannot take jurisdiction of this cause on the ground of diversity of citizenship of the parties.

Do the facts averred in the amended bill disclose a controversy involving the construction of the constitution and laws of the United States? As has been seen, by the statement made, this is a suit in which the injunctive relief prayed for is not an incident to but is the very life of the bill. The threatened and imminent injury to complainant's rights sought to be protected by the bill is the prevention of injury to the property of the Power Company averred to be covered by the lien of complainant's mortgage from being destroyed or removed from the streets and alleys of the city by its officials. That is to say, complainant seeks by its bill to preserve its private contract rights in the property of the Power Company made with Williamson from impairment by defendant city and its officials, in violation of article 1, section 10, of the national constitution, which provides: "No state shall pass any *law impairing the obligation of contracts.*" *"If, therefore, defendants sought to be restrained are acting in defiance of law, or are acting in the absence of any authority or pretended authority conferred on them by a law of the state, or by virtue of an ordinance of the city authorized by a law of the state, and which legislative enactment or ordinance of the city was passed subsequent to the making of the contract on which complainant relies, it is clear this court has no jurisdiction to interfere on such ground."* * * * * * * * *

In Hanford v. Davies, 163 U. S., 273, Mr. Justice Harlan, delivering the opinion of the court, says:

"The bill proceeds upon the ground that the orders of the probate court, resulting in the sale of the lands in controversy as the property of Lumley Franklin, and in the conveyance of 1888 to the defendant Davies, impaired the obligation of the alleged contract with the Territory as evidenced by the deed of 1878 to Thaddeus Hanford. But it was not alleged in the bill that the proceedings in the probate court were had under any statute that was repugnant to the constitution of the United States, or which was enacted after the sale and conveyance of these lands by the Territory to Thaddeus Hanford. The prohibition upon the passage of state laws impairing the obligation of contracts has reference only to the laws, that is, to the constitutional provision or to the legislative enactments, of a state, and not to judicial decisions or the acts of state tribunals or officers under statutes in force at the time of the making of the contract the obligation of which is alleged to have been impaired. Railroad Co. v. Rock, 4 Wall. 177; Lehigh Water Co., v. Easton 212 U. S. 388; Wood v. Brady, 150 U. S. 18; Central Land Co. v. Laidley, 159 U. S., 103."

In St. Paul Gas Light Co. v. St. Paul, 181 U. S. 142, Mr. Justice White, delivering the opinion of the court, said:

"It is no longer open to question that 'a by-law or ordinance of a municipal corporation may be such an exercise of legislative power delegated by the legislature to the corporation as a political subdivision of the state, having all the force of the law within the limits

of the municipality, that it may properly be considered as a law, within the meaning of the article of the constitution of the United States.' New Orleans Waterworks Co. v. Louisiana Sugar Refining Company, 125 U. S. 18, 31; Hamilton Gas Light & Coke Company v. Hamilton City, 146 U. S. 258; Walla Walla v. Walla Walla Water Company, 172 U. S. 7."

Turning now to the amended bill of complaint for the purpose of examining its averments in search of an act of the legislature of the state, or an ordinance of defendant city enacted in pursuance of power granted by the state, subsequent to the date of complainant's mortgage, charged by complainant to be unconstitutional and void because attempting to authorize demurrants to impair rights granted by such mortgage, it is found charged in paragraph 4 of the bill, as follows:

'That on or about April 22, 1907, at the expiration of the period mentioned in said original contract between said city of Clay Center and said Dexter, the defendant city, acting by and through the individual defendants named herein, at a regular session of the city council of such city attempted to repudiate and annul said contract so made as aforesaid with said Dexter; and, without any notice to your orator attempted to, by pretended corporate action of said city, annul and destroy any and all rights of your orator, as the holder of a lien upon said property connected with said electric light plant; and, without notice to your orator took some actin with the details of which your orator is unacquainted, resulting in a denial by said city of any liability whatsoever growing out of said contract so entered into with the said Dexter and refused to recognize the terms of the same. Your orator further avers that, influenced so to do by a determination to violate and impair the obligation of said contract of April 22,

1886, the said city of Clay Center and the said individual defendants, pretending to act officially in the premises, threatened to destroy said electric light plant by tearing down the poles and wires and other electric equipment connected therewith, and to destroy and impair the business of said electric light plant by the physical destruction of the means employed thereby in the furnishing of electrical power and light to the inhabitants of said city of Clay Center; that said individual defendants, pretending to act as members of the council of said city, and said city have threatened to and will, if not restrained by the orders of this court, forcibly remove from the streets and alleys of said city all of the electrical equipment, including posts and wires belonging to and forming a part of the electric light plant, which, as aforesaid, was conveyed unto your orator as security for the payment of said bond so executed by the said Williamson to the said Investment Company; and, the said individual defendants and said city threaten to and will, unless restrained by the orders of this court, break up and destroy said poles, wires and other equipment connected with said electric light plant, and thereby destroy the usefulness of said electric light plant, and prevent it from carrying out its contracts with a large number of inhabitants of the city of Clay Center with whom it has business connections, and thereby the security of your orator for the payment of said bond will be inevitably destroyed to the irreparable injury of your orator in that behalf.

"What corporate action defendant city through its officials took is not shown by this charge in the bill. On what authority emanating from the state the corporate action taken was based, is not shown. In what manner the corporate action affected the rights of complainant is not shown. There is here, clearly, no mu-

nicipal act of the city authorized by the state, charged, which impairs the obligation of complainant's contract with Williamson, so pleaded as to raise any issuable controversy depending on the construction of the constitution and laws of the United States. * * However, solicitors for complainant in their briefs make reference to chapter 121, laws of 1905, which among other things, provides:

"Section 1. The streets, alleys, public parks and grounds in cities of the second and third classes in the state of Kansas shall be under the control of the mayor and councilmen of the municipalities thereof and the jurisdiction over and the control thereof is vested in said cities.

"Section 2. Before any person, firm or corporation shall have the right to enter upon the streets, alleys, public parks and grounds of any city of the second or third class in the state of Kansas for the purpose of piping the same for gas, heat, light, water, or for the construction of any railways, street railways, sewerage system, telephone or for any other purpose whatsoever, such person, firm or corporation must first procure the passage of an ordinance by the mayor and councilmen of such city granting unto such person, firm of corporation such right or rights and in which said ordinance shall be defined fully and at length the terms upon which said right is conceded.

"Section 3. Any person, firm or corporation, their agents, servants, or employes, who shall, without first having obtained by ordinance from such municipal authorities as hereinbefore provided, authority so to do, enter upon any of the streets, alleys, public parks or grounds of such cities and interfere with the surface thereof, or dig ditches, or obstruct the same in any

way, or otherwise interfere therewith, shall be guilty of a misdemeanor for each day this act shall be thus violated, and upon conviction thereof shall be fined in any sum not exceeding one hundred dollars for each such offense; provided, that in cities of the second and third class where street grades have been established property owners adjacent to such may fill in such streets to the center thereof so as to bring them up to such grade."

At the date of the passage of this act the Power Company by the consent of the city was occupying the streets and alleys of the city with its poles, wires and appliances by virtue of the franchise granted by the city. It is not charged this act conferred or attempted to confer any power on defendant city to its officials to do the threatened acts sought by complainant to be prevented, nor is is charged this act in any of its provisions is beyond the constitutional power of the state. *It is evident from a consideration of its terms the sole purpose of the law making power in its enactment was to place within the control of the city the power to prohibit those seeking to construct along its streets and alleys appliances necessary for the use of public service corporations without the consent of the city, and it was not intended thereby to grant to municipalities such as defendant city, the power to abrogate any contract right theretofore made by the city with the grantor, Dexter, his successors and assigns, involved in this controversy.*

The real gist of complainant's controversy with the city as appears from a reading and consideratian of the amended bill, is, that in the litigation between the Power Company and the city, to which complainant was not a party, it was decreed by the supreme court, that provision of the contract of the city with Dexter, his successors and assigns which provides either for the ex-

tension of the grant beyond twenty-one years, or in the alternative, the purchase of the works by the city if it should refuse to further extend the franchise rights granted thereunder, was declared non-enforcible against the city. Hence, it is contended complainant's contract rights under its mortgage were cut off, destroyed and impaired, and acting on this assumption the officials of the city are about to remove or destroy the property in controversy. It is further contended the decision of the supreme court in holding such provision of the contract between the city and Dexter to be non-enforcible, in the absence of complainant from that case, operates to deprive complainant of its property rights without due process of law, in violation of the fourteenth amendment to the national constitution and much reliance is placed on the case of Chicago, Burlington & Quincy Railroad Company v. Chicago, 66 U. S. 226, and kindred cases. However, in regard to this contention, it may be observed, the matter at issue in the state court was as to the validity of that provision of the contract made by the ordinance between the city and Dexter (to which the Power Company had succeeded by purchase) *after the expiration of the twenty-one years named in the contract as the life of the grant.* To that controversy the city and the Power Company alone were parties, bound by the decree entered. *The subject-matter and the parties were before the court and its final decision is controlling and must be given effect here. The judgment in that case pronounced neither authorized nor attempted to authorize the city or its officials to destroy or remove from the streets and alleys of the city any property in which complainant has an interest, or to impair any right therein held by complainant by virtue of its mortgage, or to take from complainant any property right.*

In Railroad Company v. Rock, 4 Wall., 177, Mr. Justice Miller, delivering the opinion of the court, said:

"In the argument of counsel before us, no attempt is made to show that any provision of the constitution of the state of Iowa conflicts in any way with the constitution of the United States. The whole case, in the language of the brief, is put upon the ground that the supreme court of Iowa made a decision in this case which impairs the obligation of contracts;' and the argument goes upon the fundamental error that this court can, as an appellate tribunal, reverse the decision of a state court because that court may hold a contract to be void which this court might hold to be valid. If this were the law, every case of a contract held by the state court not to be binding, for any cause whatever, can be brought to this court for review, and we should thus become the court of final resort in all cases of contract, where the decisions of state courts were against the validity of the contracts set up in those courts."

In Knox v. Exchange Bank, 12 Wall, 370, same Justice delivering the opinion of the court, said:

"But we are not authorized by the judiciary act to review the judgments of the state courts, because their judgments refuse to give effect to valid contracts, or because those judgments, in their effect, impair the obligation of contracts. If we did, every case decided in a state court could be brought here, when the party setting up a contract alleged that the court had taken a different view of its obligation to that which he held.'

"Again, as complainant was not a party to the case in the state court, if that court had by its decree taken or authorized the officials of the city to take or destroy

any property or property right of complainant's, and defendants should attempt to justify their threatened acts under such decree, complainant might then complain of want of due process of law, but such is not this case. The threatened acts of defendants against which relief is demanded in the bill in so far as the averments of the bill disclose, being neither attempted under authority of any legislative act passed subsequent to the creation of complainant's contract rights, if any, in the property, nor in pursuance of any subsequent ordinance of the city alleged to have been authorized by any act of the state, it may not be held the bill discloses the threatened acts to be in violation of complainant's rights guaranteed by article 1, section 100, of the national constitution; and, as the bill fails to disclose such threatened acts are about to be committed by defendants in pursuance of authority conferred by the judgment or decree of the state tribunal wanting in due process of law because entered against complainant not brought before the court, it follows, complainant must pursue its remedy whatever that may be, in the forum of the state. This court is without jurisdiction. The demurrer for want of jurisdiction in this court must be sustained.

As the court is without jurisdiction, the equities of the bill are not considered.

It is ordered, unless complainant, being advised by its solicitors, shall amend its bill, showing jurisdiction in this court, before the next ensuing rule day thereof, the bill will stand dismissed.

It is so ordered.

JOHN C. POLLOCK, *Judge.*

While we firmly believe from the above authorities that before a suit can be said to be one arising under the constitution and laws of the United States, it must be a suit growing out of, created by or brought into being by the laws or the constitution of the United States, and, therefore, even if it could be said that the law of 1925, of the state of Kansas, on its face impaired the obligation of the Dexter contract, that this fact would not make the suit one arising under the constitution of the United States so as to give the court original jurisdiction, we will proceed to argue the question from the standpoint that we are mistaken as to this proposition of law.

A mere allegation in the bill of complaint that a statute impairs the obligation of a contract or that a decision of the court deprives a party of his property without due process of law does not make it so. The bill sets out the law and this court has access to the decision plead by the complainant and unless the whole record shows jurisdiction and shows the facts necessary to give the court jurisdiction, the court cannot assume it. Now, if the decision of the court relied upon and the statute relied upon as alleged in the bill show for themselves that the one has no reference whatever to the contract in question and the other does not deprive anybody of any property either with or without due process of law, then the court below has no jurisdiction.

So that the court may have same directly before

it as we argue this proposition, we will set up that portion of the bill which alleges that the law impairs the obligation of a contract and that the decision of the supreme court deprives the complainant of property without due process of law. That which we are about to set out is the only portion of the second amended bill which differs from the bill and amended bill. It is as follows:

"That by said act of 1905 the state of Kansas placed the entire control of the use of the streets of said city in the hands of its officers, to-wit, its mayor and council; and, authorized said city to withhold its consent to the use of its streets and alleys upon any pretext and for any or no reason;

That in pursuance of such power and authority so granted the said city by its mayor and council in October, 1906, duly passed a resolution declaring that said city would not consent to the said Light & Power Company's use of said streets and alleys beyond the expiration of 21 years from April 22, 1886, and duly notified said company of said resolution; and, in March, 1907, the said city duly adopted an ordinance in terms repealing said ordinance and contract of April, 22, 1887;

* * * * * * *

"Your orator avers that under said ordinance of April 22, 1886, and by virtue of the conveyances aforesaid, the said Light & Power Company has a lawful right to occupy said streets and alleys in the manner aforesaid; but said city of Clay Center and the individual defendants herein, as officers of said city, acting under and by virtue of the powers conferred upon them by said statute of 1905, relative to the control by said city of the use of its streets and public grounds and act-

ing under the decision of said supreme court relative to said ordinance of 1886, threaten to and will, unless restrained by the order of this court, tear down, remove and utterly destroy the poles, wires and other equipment now and for some time before the beginning of this suit employed by said Light and Power Company, defendant herein, for the distribution of electric light and power to the citizens and inhabitants of the said city of Clay Center; that the said city and said individual defendants as officers of thereof, are authorized and have the right so to tear down, remove and restroy the property of said Light and Power Company so employed and to institute criminal proceedings against said company and its officers and employes for continuing to use said streets and alleys for said purpose by virtue of the authority conferred upon cities of the second class by said act of 1905, and by said decision of the supreme court; that said city of Clay Center and said individual defendants have demanded of the said Light and Power company that it forthwith remove said posts and wires from the streets and public grounds of said city, and thereby compel the said Light and Power Company to discontinue its said business of distributing electric light and power by means of said posts and wires to the citizens and inhabitants of said city; that said poles and wires are a part and parcel of, and connected with, said electric power plant owned and used by said Light and Power Company, and constitute the only available means by which said Light & Power Company can distribute to the citizens and inhabitants of said city electric light and power and carry on the business for which it was incorporated and for which its property is adapted; that if said poles and wires are torn down, removed and destroyed by said city and said individual defendants, acting as officers thereof, the business and property of said Light and Power Company will be utterly destroy-

ed, and become wholly useless and thereby the security of your orator for the payment of its debt will be greatly impaired, if not made wholly worthless; that said city of Clay Center and said individual defendants unless restrained by this court, threaten to, and will by force and violence remove said poles and wires from said streets and alleys, and resort to criminal process against said Light and Power Company and its servants and otherwise interfere with and damage the business of said company with the resulting effect of impairing and destroying the aforesaid security of your orator.

"Your orator avers that the statute enacted by the legislature of the state of Kansas in 1905, and hereinbefore referred to, impairs the obligation of the contract entered into by said city of Clay Center and said Dexter in 1886 under which your orator is bound to and does claim security for the payment of its debt, and, therefore, your orator avers that said act of the legislature of the state of Kansas, enacted in 1905, and hereinbefore referred to, violates that provision of the constitution of the United tates prohibiting any state from passing any law impairing the obligation of contracts; and your orator further avers that the decision of the supreme court of Kansas, holding and deciding that said city of Clay Center had no power or authority to grant unto the said Dexter and his assigns, the use of said streets and alleys for the erection thereon of poles to carry wires to distribute electric light and power to the citizens and inhabitants of said city for a longer period than twenty-one years, impairs the obligations assumed by said city under said contract and denies unto your orator the equal protection of the laws in violation of the constitution of the United States, and said threatened acts of said city of Clay Center and of the individual defendants, as officers of said city authorized by said statute

and decision, to-wit, the tearing down, removing and destroying said poles and wires and thereby making worthless the property upon which your orator depends for the payment of its debts will deprive your orator of its property without due process of law in violation of the fourteenth amendment of the constitution of the United States providing that no person shall be deprived of his property without due process of law."

The law set up in the amended bill which is alleged to impair the obligation of the contract is in words following, to-wit:

"Section 1. The streets, alleys, public parks and grounds in cities of the second and third classes in the state of Kansts shall be under the control of the mayor and councilmen of the municipalities thereof and the jurisdiction over and the control thereof is vested in said cities.

"Section 2. Before any person, firm or corporation shall have the right to enter upon the streets, alleys, public parks and grounds of any city of the second or third class in the state of Kansas for the purpose of piping the same for gas, heat, light, water, or for the construction of any railways, street railways, sewerage system, telephones or for any other purpose whatsoever, such person, firm or corporation must first procure the passage of an ordinance by the mayor and councilmen of such city granting unto such person, firm or corporation such right or rights and in which said ordinance shall be defined fully and at length the terms upon which said right is conceded.

"Section 3. Any person, firm or corporation, their

agents, servants or employes, who shall, without first having obtained by ordinance from such municipal authorities as hereinbefore provided, authority so to do, enter upon any of the streets, alleys, public parks or grounds of such cities and interfere with the surface thereof, or dig ditches, or obstruct the same in any way, or otherwise interfere therewith, shall be guilty of a misdemeanor for each day this act shall be thus violated, and upon conviction thereof shall be fined in any sum not exceeding one hundred dollars for each offense."

After setting up the above statute passed in 1905, the second amended bill alleges that this act or statute authorizes the city and the officers thereof to tear down, remove and destroy the property of said Light and Power Company so employed and also authorizes them to institute criminal proceedings against said company and its officers and employes for continuing to use said streets and alleys for said purposes and also alleges that they are authorzed to do this by the decision of the supreme court in the case of City of Clay Center et al. vs. Clay Center Light & Power Company, 78 Kansas, 390. Now the decision of the supreme court in that case did nothing of the kind and a mere allegation that it did amounts to nothing for it is the duty of the court to read the case and when the case itself proves the allegation to be absolutely false such allegation will not confer jurisdiction on this court. After considering the question of this judgment upon the demurrer the court below in its opinion says:

"The judgment in that case pronounced, neither

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authorized nor attempted to authorize the city or its officials to destroy or remove from the streets and alleys of the city any property in which complainant has an interest or to impair any right therein held by complainant by virtue of its mortgage or to take from complainant any property rights."

This is all that it is necessary to say concerning the judgment complained of in the bill. The judgment was absolutely silent as to any right of this complainant. It simply decided that the complainant in that case could not compel the city to buy its plant. That, that portion of the contract attempting to bind the city to buy at the end of twenty-one years was beyond the powers of the city and, therefore, *ultra vires*.

We now take up the allegation that the law of 1905 gives the city and its officers power to destroy the property of complainant and that therefore it is in conflict with the constitution of the United States which prohibits any state from passing a law to impair the obligation of contracts.

The simple reading of the 1905 law will show clearly that it gives no such powers as those set out in this bill. It does not refer in any way to public utility corporations which have already been granted rights upon the streets of cities of the second class. It shows on its face that it is simply a bill, providing that in the future, before any person, firm or corporation shall have a right to go upon the streets of a city of the second class, it shall get the consent of such city by ordinance duly passed. By no rule of construction ever laid down

by any court or by any text writer could this act be made to apply to the contract between the city and Dexter which was entered into in April, 1886, nineteen years before the passage of such act. Laws are never retroactive unless there is a specific declaration within the act itself making it retroactive. The court below considered this act and in its opinion said:

"It is evident from a consideration of its terms the sole purpose of the law making power in its enactment was to place within the control of the city the power to prohibit those seeking to construct along its streets and alleys appliances necessary for the use of public service corporations without the consent of the city, and it was not intended thereby to grant to municipalities such as defendant city, the power to abrogate any contract right theretofore made by the city with the grantor, Dexter, his successors and assigns, involved in this controversy."

This ought to be sufficient on this allegation of the bill and perhaps this brief should stop right here. Inasmuch as abundant authority is at hand to sustain the position taken by us, we will proceed to cite a few of them.

That the mere allegation in the bill that a federal question is involved, that the suit arises under the constitution and laws of the United States or that a statute of the state impairs the obligation of a contract does not make it so nor give jurisdiction. Before the court has jurisdiction, it must appear that the suit is one arising under the constitution or laws of the United States. Where there is an allegation that a statute of

a state impairs the obligation of a contract, the statute must be set out and if the statute itself together with the allegations shows that it does not impair the obligation of any contract no jurisdiction is shown in the bill. Right here let us call the attention of the court to the fact that there is no allegation in the bill that this action is one "arising under the constitution or laws of the United States." The suit is grounded entirely upon the allegations that the act of 1905 impairs the obligation of the contract. To show that the mere allegation that it impairs the obligation of a contract does not confer jurisdiction, we will call the court's attention to the case of Water Company v. Newburyport. In this case the allegation was that the property of a water company was taken without due process of law. The court considered the statute of Massachusetts which authorized the taking and which was claimed to impair the obligation of a contract and considered the allegations and all of the facts and then after a full consideration of all, held that the circuit court had no jurisdiction, and, therefore, neither had the supreme court of the United States. In passing upon the question the court said:

"If jurisdiction is to be determined by the mere fact that the bill alleged constitutional questions, there was, of course, jurisdiction. But that is not the sole criterion On the contrary it is settled that jurisdiction does not arise simply because an averment is made as to the existence of a constitutional question, if it plainly appears that such averment is not real and substantial,

but is without color of merit. Underground Railway Co. v. New York, 193 U. S. 416, ante 239, 24 Sup. Ct. Rep. 143; Owensboro v. Owensboro Waterworks Co., 191 U. S. 358, ante 217, 24 Sup. Ct. Rep. 82; Defiance Water Co. v. Defiance, 191 U. S. 84, ante 140, 24 Sup. Ct. Rep. 63; Swafford v. Templeton, 185 U. S. 487, 46 L. ed. 1905, 22 Sup. Ct. Rep. 783; McCain v. Des Moines, 174 U. S. 168, 181, 43 L. ed. 936, 941, 19 Sup. Ct. Rep 644, and cases cited."

> Newburyport Water Co. v. Newburyport, U. S. L. ed., vol. 48, page 795 Opinion 799."

We also call the attention of the court to the case of McCain v. City of Des Moines. The first paragraph of the Head-notes to the case reads as follows:

"The claim of plaintiffs that their property is about to be taken from them by the authorities of the city without due process of law and in violation of the federal constitution because the statute of the state under which the proceedings were taken violates the constitution of the state, does not involve the construction of nor make the suit one arising under the federal constitution."

Under the facts alleged as set out in the above consideration, studied the act that was claimed to be in conflict with the constitution and came to the conclusion that the allegations of the petition were not warranted and dismissed the case. In concluding its opinion the court said:

"The allegation that the suit arises under the constitution of the United States is so palpably unfounded that it constitutes not even a color for the jurisdiction of the circuit court."

Walter M. McCain v. City of Des Moines, U. S. L. ed., vol. 43, 936.

It will be noticed that notwithstanding the fact that there was a fair and square allegation that the statutes of Iowa were in violation of the federal constitution and of the state that the supreme court of the United States held that this was not sufficient but it was the duty of the court to consider the statutes and all the surrounding circumstances and that unless they clearly show that the suit did arise under the constitution and the laws of the United States that the federal court had no jurisdiction. The court further says that even though there was an allegation that the suit arose under the constitution of the United States that the allegation was so palpably unfounded that it did not even constitute a color for jurisdiction. That is just exactly the situation in this case. The allegation that this law of 1905 gives the city the power to interfere with the property of the complainant even to destroying it and the allegation that the statute impairs complainant's security is from a reading of the law itself, so palpably unfounded that it does not constitute even a color for the jurisdiction of the court below.

In concluding this branch of our argument it might be well to give a history of this law of 1905, which is

now claimed by complainant to impair the obligation of the Dexter contract. As said by the court below, it is evident "From consideration of its terms the sole purpose of the law-making power was to place within control of the city the power to prohibit those seeking to construct along its streets and alleys appliances necessary for use by public utility corporations without the consent of the city, and never intended to give any power to abrogate contracts made prior thereto." This will appear so plain when the history of the legislation is called to mind, that we deem it advisable to call the court's attention to the thing which brought about the passage of the act in question. Prior to 1901 cities of the second class had full control over their streets, alleys and public grounds.

In 1901 the legislature passed an act relating to the right of way and leases of certain corporations. The same is chapter 128 of the session laws of 1901. It provided that certain corporations named therein, among which was a gas corporation, should have rights of way to conduct water, gas, air or for transmitting power, and that they might conduct the same through or over any lot or along or upon any stream of water, using so much of the water thereof as may be needed for certain purposes, and then provided that they might for certain purposes place their pipes, etc., "through any street or alley or public ground of any city of the second class, provided that no such canal or race-way shall be located through any street or alley or any public ground of any city without the consent of the municipal authorities thereof.'

In 1902 the Elm Township Gas, Light, Fuel & Power Company struck gas at or near the city of La Harpe and began to dig up the streets and alleys of that city for the purpose of piping its gas over the city. The mayor and council put a stop to their digging the trenches in the streets and alleys of the city. An action was begun by the gas company to enjoin the city officers from interfering. The action was tried and finally landed in the supreme court of the state of Kansas and an opinion was handed down in April, 1904

The supreme court held that under chapter 128 of the laws of 1901 the gas company had the right to use the streets and alleys of the city for the purposes mentioned without the consent of the city; that the legislative control over the streets and alleys of cities is supreme, and the legislature having by said act given gas companies such rights in all cities of the second and third classes, that gas companies could lay their pipes in the streets and alleys in spite of anything that the city could do.

The court did not decide that the cities had no control over their streets and that no power had ever been given them over the streets, until the act of 1905, but on the contrary it held that "the general statutes relating to the government of cities generally placed the power to lay out and improve streets and public grounds and to regulate their use in municipal officers, but that is a power which the state may exercise either directly or through one of its agencies."

"In placing the control of streets and public grounds

in cities, the legislature surrendered none of its own power, nor did it vest any rights in such cities a against the public. * * * * * * *

The state gives and the state can take awey, and the legislature is at liberty to resume so much of the control of the streets and alleys and public grounds formerly exercised by the city as it deems best and this without obtaining the consent of either the officers or the inhabitants of the city."

LaHarpe v. Gas Company, 69 Kan. 97.

In passing upon this question, the court pointed out the way to remedy the evil as the court realized it to be, of various corporations digging up the streets without consent, by suggesting that the legislature was the place to go for the remedy. This decision was rendered April 9th, 1904. The first session of the legislature after the rendition of this judgment was the session of 1905. The cities over the state of Kansas having discovered by the decision in the LaHarpe case that corporations had slipped in and got legislation taking away from the cities certain powers of control over their streets and alleys complained to the legislature, and asked for the passage of a law compelling all corporations in the future to get consent of a city before it could dig up its streets and alleys and carry on business therein, and for the purpose and for the purpose only of remedying the evil disclosed by that decision, the legislature passed chapter 121 of the session laws of 1905.

The above is the history of the law of 1905 which complainant sets out as the law passed by the legislature subsequent to the making of the contract with Dexter in 1886 and which it is claimed impairs the obligations of the contract and gives authority to the city to pass an ordinance repudiating a contract made in 1886.

By just a casual glance at the history of this law and at the law itself, the court will readily see that there is not one line, syllable or sentence that could possibly be construed by anybody as referring to any person or corporation of any kind, or any franchise of any kind under which any person, corporation or company had been doing business prior to its passage.

VII.

When we began this brief it was not our intention to take up much time or space in discussing the allegation in the second amended bill that that in March, 1907, the city adopted an ordinance in terms repealing the ordinance or contract with Dexter in 1886. We did not believe that in the absence of any ordinance set out in the bill that such an allegation was of sufficient importance to require any comment. Before much attention should be paid to a mere allegation that an ordinance was passed which impaired the obligation of a contract the complainant should certainly set out the ordinance so that the court could say for itself whether it had such tendency. We have shown in this brief that before the ordinance could be deemed an act of the

state impairing the obligation of a contract it would have to be based upon some law of the state passed subsequent to the making of the contract. And as no law has been pointed out authorizing such an ordinance it would simply be a void ordinance and being void and without authority of the state could not be classed as a law impairing the obligation of a contract. We think this proposition is clearly established by the authorities, but inasmuch as the parties have alleged the passage of an ordinance by the city repealing the Dexter franchise and claiming that the same impairs the obligation of a contract we think it best perhaps to meet the question here and now.

What ordinance complainant refers to, we have no means of knowing as none is set out either by title, number, copy or in any other way. The allegation is in the words following:

"In March, 1907, the said city duly adopted an ordinance in terms repealing said ordinance and contract of April 22nd, 1886."

The position we take is that if the city did pass an ordinance repealing the Dexter franchise it had a perfect legal right to do it and such repeal would not be an act of the state or of the city impairing the obligation of the contract because when the Dexter franchise was granted the city specifically reserved the right in the ordinance granting the franchise to Dexter to repeal the same. We take the law to be that where a

state has reserved the right in its constitution to alter or repeal charters or franchises that the state may repeal the same at any time by act of its legislature without going into any court to have a forfeiture declared, and when the state acts upon its own investigation and declares the forfeiture, a presumption arises at once that a proper investigation was made and the repeal puts an end to the franchise and no court has a right to interfere therewith.

When a state has reserved the right in its constitution to alter or repeal charters or franchises and such state grants power to its municipal corporations to grant franchises for public utility corporations to occupy its streets, alleys and public grounds and such municipal corporation reserves the right to repeal the franchise granted or in other words to declare a forfeiture itself, such municipal corporation may investigate for itself and decide for itself when condition is broken, giving it the power to repeal and when it repeals such franchise such repealing ordinance is absolutely valid, and instead of impairing the contract it is enforcing the same according to its very letter and spirit and cannot therefore be considered as an act of the state or of the municipal corporation impairing the obligation of a contract.

Section 1 of article 12 of the constitution of Kansas reads as follows:

"Section 1. The legislature shall pass no special act conferring corporate powers. Corporations may be

created under general laws; but all such laws may be amended or repealed."

Section 1,000 of the general statutes of 1901 conferred upon cities of the second class the power to grant franchises to any person, company or corporation to use the streets, alleys and public grounds in lighting such cities. It was under this paragraph that the Dexter franchise was granted.

The Dexter ordinance, contract or franchise under which complainant claims the right of the Clay Center Light & Power Company to maintain its poles and wires upon the streets of the city of Clay Center, Kansas, specifically *reserved the right to repeal the same at any time*. If the city had the right under the law to repeal the ordinance, then the ordinance repealing the same could not be considered an act impairing the obligation of the contract embraced in the ordinance repealed. To show that the city had the right to repeal the ordinance, we again set out section 9 of the ordinance. It is as follows:

"Section 9. That the duties and privileges hereby granted are for a term of twenty-one years; provided, the said Alonzo F. Dexter, his successors and assigns, shall begin the erection of the said electric light works within ninety days from the passage of this ordinance and shall complete the same and have the same in working order within one year from the passage of this ordinance, and provided further, that if at the expiration of twenty-one years the city shall refuse to grant a further continuance of these privileges, the said city

shall purchase said works at their appraised value, the same to be appraised by three disinterested electors of the state of Kansas, one of whom shall be chosen by the city, one by Alonzo F. Dexter, his successors and assigns, and the two so chosen shall select a third, and the amount agreed upon, upon their oaths, by the three so chosen, shall be the price to be paid therefor; and provided further, that the CITY OF CLAY CENTER SHALL HAVE THE RIGHT TO REVOKE THE PRIVILEGES HEREIN GRANTED AT ANY TIME IF THE SAID ALONZO F. DEXTER, HIS SUCCESSORS AND ASSIGNS, SHALL FAIL TO FULLY COMPLY WITH THE PROVISIONS OF THIS ORDINANCE."

That portion of the above section printed in capitals shows that the city specifically reserved the right to repeal. Now we claim that under such a reservation the city could make its own investigation and determine for itself when the event had happened which authorized the repeal and that the repealing ordinance is conclusively presumed to be correct and that no court has a right to inquire into the matter as to whether or not the event had happened which gave the city the right to revoke. On matters of this kind the law of the state granting the charter is itself the law of such case. If that law grants the right, the right exists. Where it is a municipal corporation the ordinance granting the franchise is the law of the case just as much as the law of the state would be which grants a charter.

The legislature of the state of Pennsylvania passed law relating to charters of corporations. In said cor-

poration act they reserved the right of the legislature on failure to comply strictly with said law to repeal said charter or franchise. It was contended by a corporation that the state must first go into court and have said charter declared forfeited. The supreme court of Pennsylvania held to the contrary and declared the law to be that when the legislature reserves to itself the right to repeal a charter on the happening of an event it might repeal without invoking the judgment of a court. In passing upon the question the supreme court of Pennsylvania said:

"The two facts then existed whereby, under the provisions of its charter, all its rights and privileges should revert to the commonwealth. The statute law of the grant itself becomes the law of the case. When the legislature reserves to itself the right to repeal a charter on the happening of a certain event, it may enact the repeal whenever the event happens without first invoking the judgment of a court."

Commonwealth ex rel v. Lykens Water Co., 2 Atl. 63-64.

The same doctrine has been held in New York in the case of McLaren v. Pennington. The court said:

"The reservation of such a power in a legislative grant, if it was contrary to the common law, would of itself change the law in relation to that particular grant and the statute law of the grant itself would form the law of the case."

McLaren v. Pennington, 1 Paige, 101-109.

This same question was passed upon by the supreme judicial court of Massachusetts. In the law granting the franchise the state reserved the right to repeal the charter for any abuse or misuse of such charter by the corporation. The legislature determined for itself that a bank operating under a charter had not complied with the provisions of such charter and without going into any court to have the charter declared forfeited repealed the same. The court held that the act in ascertaining that the event had happened which authorized the repeal was not a judicial act and that the legislature had the right to examine into the facts and declare the forfeiture without any judicial action in the matter. The court said:

"The 40th section contains very important reservations applicable to this and other bank charters, which have been relied upon by the plaintiff's counsel. It contains a reserved right to the legislature by its committee, to examine into the doings and the vaults and books of all the banks, and for certain specified causes, to declare any of their charters forfeited. To the constitutionality of this reservation it is objected that though a charter may be forfeited for many causes, yet the declaration of forfeiture is a judicial act, which by the 30th article of the bill of rights the legislature is prohibited from exercising. * * * *

"The last section of the 13th title upon the subject of corporations is general and manifestly applies to and governs all preceding regulations upon the subject as much as if it had been repeated at the end of each chapter. No one doubts that it applies to banks. It pro-

vides that all acts of incorporation passed after a certain time shall, at all times, be subject to amendment, alteration or repeal, at the pleasure of the legislature; provided that no act of incorporation shall be repealed unless for some violation of its charter or other default, when such charter shall contain an express provision limiting the duration of the same.

This section constitutes a part and must govern the construction of the contract with the Chelsea bank as if it had been recited verbatim in its charter. Under the import of this language, must depend the repealing act. Whatever may be its meaning, *the corporators have directly agreed to it by accepting their charter of which this was a constituent part.* * * *

If they have a right to make grants, they of necessity must prescribe the terms upon which they shall be made. If they may limit their duration, they may also impose other restrictions. They may determine how much or how little, how large or how small, an estate or franchise, they may grant. They may grant absolutely or on condition; so they may grant during pleasure, or until a certain event happens. *And if a grant be accepted on the terms prescribed, it becomes a compact; and the grantees can have no reason to complain of the execution of their own contract.* And Chancellor Kent, though with some appearance of reluctance, (2 Kent's Comm. 306,) says, 'If a charter be granted and accepted with the reservation, there seems to be no ground to question the validity and efficiency of the reservation.'

"The case of McLaren v. Pennington, 1 Paige, 107, is a strong case to this point. The legislature of

New Jersey granted a bank charter, for which they received a bonus of $25,000. In the act of incorporation, they reserved the power to alter, amend or repeal it. The bank went into operation, paid its bonus, and in less than one year, a shorter time than the Chelsea bank continued, the legislature deemed it necessary to interfere and actually repealed the charter. *This, upon full consideration, was adjudged to be a valid repeal.* It was contended that the reservation was repugnant to the grant, and therefore void. But this ground was distinctly overruled by the chancellor, who said, this reservation 'is not a condition repugnant to the grant; it is only a limitation of the grant.' Had the proviso to this section been omitted, this charter might have been amended, altered or repealed 'at the pleasure of the legislatude,' but the defendant's counsel argue that the proviso not only restricts the power to repeal, but entirely takes it away, because the inquiry whether the bank has violated its charter or committed any default, is a judicial act, and therefore cannot constitutionally be performed by the legislature. The effect of this argument is to raise banks above the control of the legislature, and place them and all corporations with limited charters, upon a different basis from other corporations.'

* * * * * * * * *

The true question is, whether the legislature can in any case repeal an act of incorporation granted for a term of years. Any charter may be forfeited by a violation or for other sufficient cause; and on a proper process a judgment might be decreed. But this would be a judicial act and might be done without the concurrence and against the will of the legislature. It is entirely independent of and unconnected with the power to repeal.

"But the legislature clearly intended to reserve the power to discontinue corporations, not only for violations of their charters, but also for other defaults; which must mean, if anything, some acts short of violations, but which were inconsistent with, if not subversive of the ends for which the corporation was established.

"They reserve the power to repeal at pleasure, provided that on certain charters, they will not exercise it, unless the corporations have committed some default. If a default has been committed, then, by the express terms of the compact, they have a right to exercise the power. They have exercised it *and therefore by the courtesy and confidence, which is due from one department of the government to another, we are bound to presume that the contingency upon which the right to exercise it depended, has happened.* Nor is the objection that the legislature has no power to inquire into the existence of the contingency, valid. If any man or body of men is invested with power to do a certain act upon the occurrence of a certain event, when the event happens they have a right to perform the act, and the most that can be urged against it is, that if it be exercised before the event happens, it is void. And this is true by whomsoever the fact is to be ascertained."

Crease v. Babcock et al., 33 Pick. 334. Opinion 341-345.

We next desire to call the court's attention to a decision of the supreme court of Pennsylvania which covers all of the questions pertaining to the right to reserve the power and to repeal the charters or franchises without going into court to forfeit the same.

We look upon it as the leading case upon this question in this country. The opinion was not only that of a great court, but it was delivered by Ex-Attorney General Jeremiah S. Black, whose great reputation as a lawyer is sufficient alone to give the opinion great weight with the courts and with the bar. In the opinion the court squarely held that where the right was reserved to repeal that the exercise of such right was not the impairing of a contract but the carrying it out according to its own terms, and that the state in repealing the charter was using her own rights and not forfeiting those of the company. Again the court said that the repeal was not breaking the bargain, but keeping it, not impairing, but enforcing the obligation of the contract. The question as to the right of the legislature to examine into the facts and ascertain for itself whether the event had happened that authorized the repeal was fully considered.

It was claimed on the part of the railway company whose charter had been repealed that inasmuch as the right to repeal depended upon a matter of fact the right could not be exercised until it had been judicially determined that the event had happened. The court argued that this could not be the law for the reason that if you went into court and the court judicially determined that the company had abused its franchise. that the court its self would order its dissolution and that therefor,under such conditions the reservation of the right to repeal would be a nullity.

The court then went on to say,

"The legislature certainly meant to reserve something more than the right to dissolve the corporation after it should be dissolved by a court. *The power to kill what is already dead is no power at all.*" . . . . . .

The opinion is so full and complete, covering every phase of the question that we cannot resist the temptation to quote largely from it. Among other things, the court said:

"It does not follow from this that corporations are beyond the reach of public control. When the privileges they enjoy are fraudently abused, the courts may pronounce them forfeited. In some cases also the legislature when granting the franchises, reserves to itself the right to revoke them. When the charter contains such a stipulation, it is as much a part of the contract as anything else that is in it. The legislative repeal of such a charter bears no resemblance to the judgment of a court against the corporation on a *quo warranto*. They proceed upon principles as different as the functions of the legislature are different from those of the judiciary. If the power to repeal be reserved, its exercise is merely carrying out the contract according to its terms; and the state is using her own rights; not forfeiting those of the company.

"The power to repeal is sometimes reserved absolutely, so that the franchises of the corporation may be revoked whenever the legislature shall think proper. It is sometimes reserved conditionally; to be exercised only in case a certain event shall happen. The event may be one which the corporations could not control,

or it may be such a one as could not occur without some default of their own. In either case the charter is repealable when the event happens.

In the charter now under consideration, the following clause occurs: 'If the said company abuse or misuse any of the privileges hereby granted, the legislature may resume the rights granted to the said company.' This was a reservation of the right to repeal the charter in case it should be violated. If it was violated, then the repeal was not breaking the bargain but keeping it; not impairing, but enforcing the obligation of the contract.

"The plaintiffs' counsel insist that inasmuch as the right to repeal depended on matter of fact, the right could not be exercised until the fact was ascertained by a judicial trial. But if this were not a mistake the reservation would be nugatory. When the abuse of a charter is judicially ascertained the corporation will be dissolved without the intervention of the legislature, and the court could not decide the fact to be true without pronouncing the judgment of forfeiture. The legislature certainly meant to reserve something more than the right to dissolve the corporation after it shall be dissolved by a court. The power to kill what is already dead is no power at all.

"The argument of the plaintiffs on this point is altogether unsustained by authorities. There are several cases directly against it. In Crease v. Babcock (23 Pick. 234) the supreme court of Massachusetts said, 'that when the legislature reserved to itself the right to repeal a charter on the happening of a certain event, they might enact the repeal whenever the event happened; it was not a reservation of judicial power.'

To the same effect is McLaren v. Pennington (1 Paige 107); and in the Miners' Bank v. the United States (1 Green 561) it was held, not only that the fact, on which the right to repeal depended, might be noticed by the legislature without the assistance of the judiciary, but that its truth could never afterwards be questioned by any court. Without intending to endorse the whole doctrine of the last mentioned case, we are very clear that the right to repeal vests in, and may be exercised by, the legislature whenever the events occur upon which they stipulated for the right. The most that can be said is, that the repeal is void if it comes before the event. If the corporators desire to contest the validity of the repealing act in court, they must at least prove that the event did not occur.

"We must therefore, fall back upon the constitution, to see whether there is anything there to prohibit the legislature from passing the act in question. That instrument declares that no law shall be made impairing the obligation of contracts. This charter was a contract: but one of its terms was, that it might be repealed if it should be abused or misused. The corporators did abuse and misuse it, and thus they placed themselves at the mercy of the legislature. Did the atonement which they were compelled to make for their default, restore them again to the condition in which they would have remained if they had never been guilty of it? They had a charter, irrepealable if they would obey it, and they were independent of the legislature. But they fell from the estate by disobedience, and their charter became repealable. Did it become irrepealable again when they were forced by this court to undo the wrongs they had committed?

"These corporators have suffered at the hands of

the legislature nothing but what they expressly agreed to suffer in a certain contingency. That contingency has literally come to pass. Their privileges have been abused and misused. But they insist that the penance they were forced to undergo ought to be accepted in place of the obedience which they promised. That is not in the bargain; and since they stand upon their contract, we do not see how we can give them more than what is there set down. The legislature agreed to disarm itself of the repealing power on condition that the corporation would remain and abide within their charter; when they went out of it, the condition was broken. The fact that they left the path of duty is not disproved by the other fact that they afterwards returned to it. Nor is their case at all helped by showing that they were driven back under the lash of a court. Their independence of legislatuve control was to be a consequence of innocence; not of guilt, followed by repentance and restitution. * * * *

"Another and still plainer view of the argument based on the law of estoppel may be taken. It is a familiar and well established rule of constitutional law that the prohibition to impair the obligation of contracts is not applicable to an act of assembly, unless it violates directly some right secured by an existing contract, bargain or agreement. That provision does not protect from legislative interference other rights acquired or created in other ways. Here, now, is an act of assembly which enforces one of the stipulations of a contract between the state and a corporation. The corprators say to the legislature, 'You shall not do this thing. We admit that your act is according to the very terms of our agreement; but certain facts and circumstances have occurred since, which bind you, in

justice, equity, and law, to abstain from taking advantage of the agreement.' The short and conclusive answer of the legislature is:

> "To enforce a contract is not to impair it, and whatever the obligations may be which arise out of the subsequent facts, it is enough that they are not obligations of the contract.' * *
>
> Erie & Northeast R. R. v. Casey, 26 Pa. St. 287; 2 Casey 287. Opinion pp. 301 to 307 inclusive.

The above case was cited with approval by this court in Greenwood v. The Union Freight R. R. Co., 15 Otto 13; Law ed. 26, 961. The American and English Enc. of Law, second ed., vol. 9, at page 550, lays down the doctrine as follows:

"Where the right of repeal is expressly reserved on a condition, its exercise upon the happening of the condition cannot be said to be violative of the contract; it is in fact the carrying out of the contract according to its terms. A repeal under such circumstances is not breaking the bargain, but keeping it; not impairing but enforcing the obligation of the contract."

The city of Belleville, Ill., granted a franchise to the Citizens Horse Railway Co. In said franchise was the following reservation, to-wit:

"Upon the failure of said company to comply with any condition herein named, the said council shall have the power which it hereby expressly reserves, to repeal the ordinance and revoke the consent hereby given."

In the opinion of the council the company failed to comply with some of the conditions of the ordinance granting the franchise and it repealed the ordinance. As to the right of the city to repeal it without going into court and having a forfeiture declared, the supreme court of Illinois said:

"These failures on the part of appellee did not of themselves avoid the contract, but they put it in the power of the city to rescind it. It is entirely competent for parties to a contract to introduce into it a provision that, if one of them fails to fulfill certain specified terms, the other shall be entitled to treat the agreement as at an end. There is a difference between this mode of discharging a contract and that by breach. When the parties have agreed that one of them shall have an option to dissolve the contract if certain of its terms are not observed, upon the nonfulfillment of the specified terms, the party may exercise his option; and if he elects to treat the contract at an end, it will be discharged. But when a term of the contract is broken, and there is no agreement that the breech of that term shall operate as a discharge, it is always a question for the courts to determine whether or not the default is in a matter which is vital to the contract; for if it is not, the contract will not be discharged. 3 Am. & Eng. Enc. Law, p. 893, note 5; Head v. Tattersall, L. R. 7 Exchg. 7. *The contract at bar was of the kind first mentioned above.* It contained provisions which made it determinable under certain circumstances *at the election of the city.* And how was the city to indicate its election to avoid the contract? Manifestly, by passing an ordinance repealing the ordinance that constituted the contract, and revoking all the rights and privileges granted thereby, and by notifying appellee to remove its

tracks, switches, and turnouts from the streets of the city. All this was done. *The contract between appellee and appellant was thereupon at an end.*"

Belleville v. Citizens' Horse Railway Co., 26 L. R. A. 681, 685 to 686.

The state of Iowa granted a charter to the Millers Bank of Dubuque, reserving the right to repeal if it was ascertained that the bank was not obeying the conditions of such charter. The state determined for itself that conditions had been broken and repealed the charter. The bank claimed that the state must first go into court and get a judicial declaration of a forfeiture. That it was for the court to determine whether the event had happened which authorized the repeal. *The bank offered to prove that it had not violated the charter. The court would not receive the evidence, but held that the state's investigation was final.* An appeal was taken to the supreme court of Iowa. The supreme court of Iowa held that the act of the legislature in repealing the charter was final and that no court had the power to inquire into it. In passing upon it, the court said:

"It is to be presumed that the original grantees believed that no legislative assembly would ever exercise the power to repeal until the contingencies contemplated had happened. Such was the confidence reposed in the good faith which the legislative assembly is presumed always to exercise towards the rights of the citizens, and it is to be regretted that the plaintiffs

in error should have their confidence so shaken as to feel themselves authorized to speak upon the records of a court, facts, if true, which would involve the members of the legislature in the deepest turpitude and corruption. The plaintiffs propose to prove, that when the act of repeal was passed, the bank had never misused or abused its privileges, and did not fail to go into operation. However legitimate it might have been for the plaintiffs in error to prove such facts before the legislature and its committee, they are now forever estopped by a solemn decision in both branches of the legislative assembly. If we award to the act of repeal the weight and power of a judgment of a court of record, or even of a justice of the peace, it will be readily admitted that it is not in the power of this or any other tribunal to collaterally question the validity of this act.

"It is true, that from a judgment of inferior judicial tribunals, in some manner an appeal can be taken to a superior within a limited time, but not so from the decision of the supreme judicial power of the land. Their decisions are final and their judgments import absolute and unquestioned verity; and so it is with the sovereign legislative power in all their decisions and acts upon rightful subjects of legislation, and that the investigation into the facts upon the ascertainment of which the legislature reserved the right to repeal, it is a rightful subject of legislation, is clear from the fact that corporators have made it so by their acceptance of the charter with such a right reserved.

In the case of Crease v. Babcock, 23 Pick., 340, the court says, 'If a default has been committed, then, by the express terms of the contract, they (the legislature) have the right to exercise the power.' They have

exercised it, and therefore by the courtesy and confidence which is due from one department of the government to another, we are bound to presume that the contingency upon which the right to exercise it depended has happened. Nor is the objection, that the legislature had no power to inquire into the contingency, valid. If any man or body of men is invested with power to do certain acts upon the occurrence of a certain event, when the event happens, they have a right to perform the act. But we do not believe that the inquiry into the affairs of a corporation, with a view to a continuance or a discontinuance of it, is a judicial act.

Had the defendants in error traversed the rejoinder and formed an issue to the jury, the trial would have directly resulted in an investigation into the evidence before the committee and the two houses of the legislative assembly, and if such an investigation should have been permitted, it would follow that the motives of the members would have come under the review of the court and jury; and if this could be done in this case, the same practice as to other acts of the legislature might prevail; this would extend the jurisdiction of the courts from expounding the law as they find it, to decisions of what the law should be, a doctrine repudiated by all enlightened courts, except in cases of clear conflict between the constitution and legislative acts, when it is made the duty of the judicial department of the government to interpose and preserve the integrity of that instrument which is above the reach of legislative interference. * * * * * *

However oppressive it may appear for a party to a contract to reserve the right of rescinding the same at

pleasure, or upon the occurrence of events, of the existence of which he is to be the judge, yet that a party has a right to make such a reservation, will not be questioned. The members of the legislature are the agents of the public, and are presumed to have no personal interests to serve, other than what pertains to their constituents in common with themselves. They act in a fiduciary capacity, and are not amenable to the odium attached to a party who reserves the right of being a judge in his own case."

Miners' Bank of Bubuque v. United States, 1 G. Green (Iowa), 552, 563, 564, 565, 566.

On the question as to the right of the court to inquire into the correctness of the findings of the legislature as to condition broken before repealing a franchise, Mr. Thompson, in his work on corporations, says:

"There is no sense in this conclusion; since what the courts suggest can be done in respect to any corporation, whether there is such a reservation in its charter or not, and the decision renders the reservation absolutely meaningless. A faithful interpretation would have construed it as meaning exactly what the legislature intended, and what the grantees, in accepting their charter conceded—the right on the part of any future legislature to revoke the grant whenever it should conclude upon evidence submitted to it that the corporation had misused its franchise."

Thomp. on Corp., vol. 4, sec. 521.

The city of Richmond granted a franchise to the Southern Bell Telephone Company reserving the right to repeal. The telephone company as in this case accepted the terms of the ordinance. The city repealed the ordinance. It then demanded all wires of the company to be removed from the streets. The company sought to enjoin the city from enforcing this order.

The suit was brought in a federal court. The court held that the city having reserved the right to repeal, the repealing ordinance was valid and that the court *had no right to investigate as to the propriety or reason for such repeal.*

In its opinion, the court said:

"The city of Richmond exercising the right of repeal reserved by it, on the 14th day of December, 1894, repealed the ordinance of June 26, 1884, granting the right of way throughout the city to the Southern Bell Telephone & Telegraph Co., such repeal to take effect twelve months thereafter. Consequently the complainant on and after the 14th day of December, 1895, had, under the laws of Virginia and the ordinance of the city of Richmond, *no legal right to occupy the streets of that city and use the same for its poles and wires.* This court is not to pass upon the propriety of the ordinance of repeal; for the power of repeal does not depend on either the necessity for it or on the soundness of the reasons assigned for it."

Southern Bell Telephone Co. v. City of Richmond, 98 Fed. 671, 673.

By an amended charter, the legislature of the state of Pennsylvania exempted certain properties of the Wagner Free Institute from taxation. It reserved the right of repeal. The legislature afterwards repealed the exemption. It was claimed upon the part of the institute that this repealing act was void because it impaired the obligation of a contract and was therefore repugnant to the constitution of the United States prohibiting states from passing laws impairing the obligation of contracts. The supreme court of the state of Pennsylvania held that where the right to repeal was reserved the rule in the Dartmouth College case does not apply and that no question under the constitution of the United States arises in such a case. In passing upon this question, the court said:

"The exemption can only exist by virtue of the amended charter of 1864. But this of course, is subject to the legislative power, under the amendment of 1857 to the constitution, to alter, revoke, or annul any charter thereafter granted. Under the constitution of the United States and the decisions of the supreme court, a charter is ordinarily a contract; but a charter which is revokable at the will of the grantor, is *only a quasi contract*. To such a charter the rule of the Dartmouth College case does not apply, and the decisions are uniform to this effect. *No question under the constitution of the United States, therefore, arises in this case.*"

Wagner Free Institute v. Philadelphia, 19 Am. St. 614; 132 Pa. St. 612.

The legislature of Massachusetts passed an act

granting a charter or franchise to a street railroad company. The laws of Massachusetts reserves the right to repeal such franchises. After the company had constructed its road the legislature of Massachusetts repealed the charter under the reservation clauses of the statutes of Massachusettes. The railway company brought its action in the *circuit court of the United States* to enjoin interference with its tracks in the city of Boston, alleging that the repealing act impaired the obligation of a contract. A demurrer was filed to the bill. The circuit court sustained the demurrer. An appeal was taken to this court and this court, speaking through Mr. Justice Samuel F. Miller, held the repealing act valid and that such act on the part of the state did not *impair the obligation of a contract*, and the decision of the circuit court, dismissing the bill, was unanimously affirmed by this court. Justice Miller, among other things said:

"The unconditional repeal of the charter of the Marginal Company is void under the constitution of the United States as impairing the obligation of the contract made by the acceptance of the charter between the corporators of that company and the state UNLESS IT IS MADE VALID BY THAT PROVISION OF THE GENERAL STATUTES OF MASSACHUSETTS CALLED THE RESERVATION CLAUSE CONCERNING ACTS OF INCORPORATION."

Judge Miller then goes into the history of the decisions of this court on the rights of states to repeal charters; takes up the celebrated Dartmouth College

case and other cases decided by this court which hold that such a repeal impairs the obligation of a contract; comments on the separate concurring opinion of Justice Story in the Dartmouth College case in which he suggested to the legislatures of the states that they might avoid the consequences of such decisions by reserving the right of repeal when granting charters to corporations. Justice Miller then said:

"It would seem that the states were not slow to avail themselves of this suggestion, for while we have not time to examine their legislation for the result, we have in one of the cases cited to us as the effect of a repeal, a case from 1 Paige, 102, in which the legislature of New Jersey when chartering a bank with a capital of four hundred thousand dollars in 1824 declared by its seventeenth section that it should be lawful for the legislature at any time to alter, amend or repeal the same."

Justice Miller then said: "This history of the reservation clause in acts of incorporation, supports our position that whatever right, franchise or power in the corporation depends for its existence upon the granting clause of the charter is lost by its repeal."

Quoting further from the opinion of Justice Miller, we find the following:

"What is the effect of the repeal of the charter of a corporation like this? One obvious effect of the repeal of a statute is that it no longer exists. Its life is at an end. Whatever force the law may give to trans-

actions into which the corporations entered and which were authorized by the charter while in force, it can originate no new transactions dependent on the power conferred by the charter. If the corporation be a bank, with power to lend money and to issue circulating notes, it can make no new loan nor issue any new notes designed to circulate as money.

"If the essence of the grant of the charter be to operate a railroad, and to use the streets of the city for that purpose, *it can no longer so use the streets of the city, and no longer exercise the franchise of running a railroad in the city.* In short, whatever power is dependent solely upon the grant of the charter, and which could not be exercised by unincorporated private persons under the general laws of the state, is abrogated by the repeal of the law which granted these special rights."

Greenwood v. Union Frt. R. R. Co., 15 Otto. 13 Law ed., 26, 961.

The state of Michigan by act of the legislature granted a charter to the Grand Rapids Hydrualic Co. It was chartered for the purpose of furnishing water to the inhabitants of Grand Rapids. The right to repeal said charter was reserved in the granting act. The hydraulic company under its charter so granted accepted the terms of the same, put in its plant and began furnishing water to the inhabitants of Grand Rapids. In 1908, the legislature repealed the statute granting the charter. The hydraulic company persisted in going on with its business after the repeal. Quo warranto was

brought by the state to oust it from transacting business, or carrying on the business of furnishing water to the inhabitants of Grand Rapids. The hydraulic company for its defense alleged that the repeal by the legislature of said charter without notice to it deprived it of its day in court and therefore it was deprived of its property without due process of law. *It also claimed that said repealing statute was in conflict with the constitution of the United States prohibiting states from impairing the obligation of contracts.* It also claimed in its defense that after it had accepted the provisions of said franchise and had erected its plant, it had issued its bonds and given a mortgage upon its plant and franchise to secure said bonds; that said bonds were then outstanding and that by repealing said charter the bondholders had no day in court and were being deprived of their security without due process of law and also that said repealing statute impaired the obligation of the contract granting the franchise to the hydraulic company upon which said bondholders held a mortgage and that this was in violation of the oenstitution of the United States. It will be noticed that everything in the Michigan case is just exactly as it is in the case at bar so far as the repeal is concerned. The complainants in this case bear the same relation to this case that the bondholders in the Michigan case did to it. The supreme court of Michigan held squarely that the repeal was valid and binding *and did not impair the obligation of any contract or deprive any person of any property without due process of law*, for the reason

that the franchise mortgaged to secure the bonds was no other than the one granted to the corporation; that the giving of the mortgage in no way lessened the right of the legislature to repeal and revoke the charter; that the bondholders acquired no greater right than the corporation had, and that when the charter was repealed *the mortgage on the franchise was dead, because the charter was dead.*

We quote the following from the opinion of the court, to-wit:

"In the circuit court respondents urged that the repealing act impaired the obligations of the contract between the hydraulic company and the state, contrary to *the provisions of the constitution of the United States;* that it deprived the company of its property without due process of law, contrary to the provisions of the constitution of the state of Michigan and of the fourteenth amendment of the constitution of the United States; that it took its private property for public use in contravention of section 2 of article 18 of the constitution of Michigan. In our judgment none of these objections are tenable. The repealing act does not take from the corporation any personal or real property acquired during its legal existence. It does take from it this, and only this: Its right to continue to be a corporation. It takes from it no right, franchise, or power which does not depend for its existence upon the granting clause of the charter, and these it had a legal right to take. Greenwood v. Union Freight R. R. Co., 105 U. S. 13, 26 L. ed., 961. These rights it obtained from the legislature of the state of Michigan. By its terms the law granting these rights might at any time be re-

pealed by the legislature. The corporation would exist until, and only until, the legislature repealed the law creating it. The life of the corporation expired, according to the terms of its charter, with the repeal of the law. Any argument that the repeal destroyed any constitutional right must rest upon the impossible assumption that the corporation had a legal right to exist for a term longer than that specified in its charter. It had no such right. If authority in support of this reasoning be needed, we think it is found in Greenwood v. Union Freight R. R. Co., 105 U. S. 13, 26 Law ed. 961.

"In this connection, we consider the claim of respondents that the *constitutional rights of certain holders of bonds of the corporation are impaired by the repealing acts.* These holders of bonds are creditors of the corporation who are secured by mortgages upon the corporate property and franchises. We deem it sufficient to say that the franchise mortgaged to secure these bonds was no other than that granted to the corporation. Nor did the mortgage in any way change its effect or lessen the right of the legislature to repeal it at any time. The bondholders acquired no greater rights than the corporation had. The existence of the bonds secured by the mortgage is, therefore, an entirely immaterial circumstances, and in no way affects the correctness of the foregoing reasoning."

People v. Calder, 152 Mich. 724, 126 Am. St. Rep. 550. Opinion 554-555.

All of the above authorities squarely hold that when the right to repeal a franchise is reserved by the granting power that the granting power may alter, change,

or repeal the same and that such act does not deprive the parties of property without due process of law and that such act does not impair the obligation of the contract entered into by the passage of the act granting the franchise and the acceptance of the same by the grantee. In its bill, amended bill and second amended bill the complainant as a part and parcel of same sets out the ordinance granting the Dexter franchise, and makes the same a part of the bill of complaint. It follows therefore, that when they allege the passage of the ordinance granting the Dexter franchise under which it is claimed that the Light & Power Company have the right to occupy the streets of the city with its poles and wires, *and set up a copy of the same as a part of said bill of complaint*, that such bill of complaint shows on its face that the city of Clay Center had the right to revoke all privileges granted by such ordinance and therefore, the bill of complaint shows upon its face *that the repeal of such ordinance would not deprive any person of property without due process of law nor would it impair the obligation of a contract.* If it did not, then the circuit court did not have jurisdiction because of such repeal.

VIII.

As a further reason why the court below was right in dismissing the bill of complaint for lack of jurisdiction is that the record shows that the claim of the complainant that a federal question is involved because of the decision of the supreme court of Kansas in hold-

ing the Dexter franchise void except for a period of twenty-one years on the ground that said judgment of the supreme court deprives complainant of property without due process of law and impairs the obligation of the Dexter contract, *is not made in good faith.* The original bill in this case made no attempt to give the court jurisdiction by alleging either the impairment of the obligation of a contract or the depriving of complainant of its property without due process of law and no attempt of any kind was made to show that the case was one arising under the constitution or laws of the United States. Jurisdiction was founded solely upon diversity of citizenship.

The defendant, the city of Clay Center and its councilmen, demurred to the original bill and pointed out that the Light & Power Company, a defendant, should be aligned with the complainant. This would destroy and take away the jurisdiction of the court.

After the demurrer was filed, pointing out that the court had no jurisdiction on the grounds of diversity of citizenship complainant filed its amended bill and in it, for the first time attempted to raise a federal question. Now, let it be borne in mind that even in the amended bill there was no allegation of any statute passed subsequent to the entering into the contract with Dexter which was claimed by complainant to impair the obligation of such contract. If we ask, why no such allegation, the only answer can be: because complainant and its solicitors knew that there was no such statute. Knowing there was no such statute, they set up

none, but attempted to bolster up the claim that the case was one arising under the constitution of the United States by alleging that the mayor and councilmen claimed that the decision of the supreme court of Kansas gave the city and its councilmen the right to destroy the property upon which complainant had its mortgage.

Now, we say that the record shows that this claim was not made in good faith. That complainant and its solicitors knew when the amended bill was filed that the judgment of the supreme court of Kansas did not give any such authority and did not impair the obligation of any contract or deprive any person of any property rights without due process of law, for the reason that in its bill of complaint it made the following allegation, to-wit:

"Your orator avers that it was not a party to the proceeding in the supreme court of Kansas wherein and whereby such a judgment and decision was rendered. That said judgment and decision of said supreme court denied unto your orator the equal protection of the law *if* such judgment and decision of said supreme court so destroying and annulling said contract is permitted to have the effect now claimed for such decision by said city and said individual defendants therein. By virtue of the action of said Kansas supreme court, your orator will be deprived of its property rights in, about and concerning said electric light plant without due process of law in this, that your orator had no opportunity to be heard nor has your orator had any notice of a hearing in respect of your orator's rights growing out of the execution of said bond and the transfer of the same unto

your orator and the existence of said first mortgage lien."

The bill then proceeds to allege that said decision and judgment of the supreme court impaired the obligation of the contract originally made by the city of Clay Center with the said Dexter and then followed all these allegations concerning due process of law and equal protection of the law and the impairment of the contract with the following allegation:

"Your orator further avers that while it is sometimes pretended by said city of Clay Center and by said individual defendants that they are authorized so to do by said decision of said supreme court, your orator avers that such pretense is a mere sham; that nothing in the decision of said supreme court justifies the destruction of the property upon which your orator has its lien as aforesaid."

The quotation above from the ammended bill of complainant and its solicitors shows absolutely there was nothing in the judgment and decision of the supreme court of Kansas to deprive anyone of property without due process of law or to impair the obligation of any contract. Knowing such to be the fact, they alleged in the complaint that any pretence that such contract did give any authority to take away any property rights *was a mere sham.*

Now,let us bear in mind the above allegations of the bill,that the decisions of the supreme court of Kansas gave no power to take away any property rights, while

we proceed with the futher history of the case in order to show the lack of good faith in the second ammended bill ff complaint.

After the amended bill was filed containing the above allegation, defendants again demurred. Upon this demurrer the court below dismissed the bill for lack of jurisdiction unless complainant should file a second amended bill. This the complainant did before the rule day of the court in March. Now, let us see what the allegations are in the second amended bill: Complainant digs up a statute of the state of Kansas in no way relating to the Dexter franchise in any way, shape or manner and in no way giving a city of the second class any authority to repeal, nullify or set aside any contract theretofore entered into by said city, but a statute relating entirely to matters and things *in futuro*, and allage it to be a law of Kansas impairing the obligation of its contract. We ask why. The answer is: The court had decided that there must be some law passed subsequent to the entering into the contract which gave power to the city to impair the obligation of that contract before the case could be said to be one arising under the constitution or laws of the United States, and the innocent statute set out was all that could be found touching the granting of franchises in any way and as a last resort it was set out, harmless as it is, and the allegation made that it impaired the obligation of a contract.

We do not believe that any court will for a mo-

ment hold that this allegation was made in good faith. Not only this, but notwithstanding the fact that in the amended bill it had alleged that the judgment and decision of the supreme court did *not* give power to take away any property rights, and after the court had sustained the demurrer to the amended bill and in order to stay in court if possible, they make an allegation directly in opposition to the solemn declaration made in the amended bill above quoted, as follows:

" * * * * * and your orator further avers that the decision of the supreme court of Kansas, holding and deciding that said city of Clay Center had no power or authority to grant unto the said Dexter and his assigns, the use of said streets and alleys for the erection thereon of poles to carry wires to distribute electricity and power to the citizens and inhabitants of said city for a longer period than twenty-one years, impairs the obligations assumed by said city under said contract and denies unto your orator the equal protection of the laws in violation of the constitution of the United States, *and said threatened acts of said city of Clay Center and of the individual defendants, as officers of said city authorized by said statute and decision*, to-wit: the tearing down, removing and destroying said poles and wires and thereby making worthless the property upon which your orator depends for the payment of its debt, will deprive your orator of its property without due process of law in violation of the fourteenth amendment of the constitution of the United States providing that no person shall be deprived of his property without due process of law."

Can it be said that a person who one day alleges that a decision of a court does *not* give power to remove

from the streets and destroy property and any pretense that it does is a mere sham, and on the next day after a demurrer has been sustained to the complaint, alleges that the same decision authorizes the tearing down, removing and destroying of the same property referred to in both complaints, is acting in good faith? In the amended complaint, the allegation is that any pretense that the decision of the supreme court authorizes the destruction of property is a mere sham. In the second amended complaint, after the sustaining of the demurrer, the allegation is that the threatened destruction of the property, the tearing down, removing and destroying of the property is authorized by that same decision. When were the parties acting in good faith? Was it when they alleged that the decision did not give any such right, or when it is alleged that it did give such a right?

It looks to us as though in the second amended bill the allegations made therein were made in an attempt to give jurisdiction to the court when complainant and its counsel knew that the case was not one arising under the constitution and laws of the United States. The allegations in the amended bill and the second amended bill are diametrically opposed to each other. Will this court say, under such circumstances, taking into consideration the absolutely harmless law set up, as the law impairing the oligation of a contract, and taking also into consideration the decision of the supreme court of Kansas which is absolutely silent as to any power of anybody to destroy property, that the com-

plainant can possibly be acting in good faith in alleging that either the law set up or the decision of the supreme court of Kansas either deprives anybody of the equal protection of the law, impairs the obligation of a contract, or deprives the complainant of property without due process of law?

CONCLUSION.

Appellant relies upon the law of 1905 and the decision of the supreme court of Kansas as the things done by the state to impair the obligation of the Dexter contract, or ordinance. As to the law of 1905, the court below very aptly said: "It is evident from a consideration of its terms the sole purpose of the law making power in its enactment was to place within the control of the city the power to prohibit those seeking to construct along its streets and alleys appliances necessary for the use of public service corporations without the consent of the city, *and it was not intended* thereby to grant to municipalities such as defendant city the power to abrogate any contract right theretofore made by the city with the grantor Dexter, his successors and assigns, involved in this controversy."

In the language of the court below in regard to the decision of the supreme court of Kansas, we say:

"To that controversy the city and the power company alone are parties bound by the decree entered. The subject matter and the parties were before the court and its final decision is controlling and must be given effect here. The judgment in that case pronounced, *neither authorized nor attempted to authorize the city or its officials* to destroy or remove from the streets and alleys of the city any property in which the complainant has an interest, or to impair any rights therein held by complainant by virtue of its mortgage, or to take from complainant any property rights."

All that is left of the second amended complaint after eliminating the law of 1905 and the decision of the supreme court of Kansas is the allegation that the city and its councilmen threatened to remove from the streets and alleys of the city the poles and the wires of the power company. Now, if the judgment of the supreme court of Kansas did not authorize the city to do this and if the law of 1905, in the language of the court below did not intend to grant the municipality the power to abrogate any contract right theretofore made by the city, with the grantor Dexter, his successors and assigns, then the threats of the city and its councilmen are in open violation of law and the carrying out of such threats would only constitute the parties trespassers against the property of the **appellant** without the consent of authority of the state of Kansas in any way.

Such allegations under such circumstances do not show that this case arises under the constitution and laws of the United States. The court below was in line with the decisions of this court when it said:

POOR CO

"If therefore defendants sought to be restrained are acting in defiance of law, or are acting in the absence of any authority or pretended authority conferred on them by a law of the state, or by virtue of an ordinance of the city, *authorized by law of the state*, and which legislative enactment or ordinance of the city was passed subsequent to the making of the contract on which complainant relies, it is clear the court has no jurisdiction to interfere on such grounds."

All there is to this case is, that if appellant had any right that needed protection, under its allegations it should have gone into the state court instead of the federal court to obtain it.

Respectfully submitted,

A. A. GODARD,
F. B. DAWES, *and*
R. C. MILLER,

Solicitors and Counsel for the Appellees, the City of Clay Center and its Councilmen.

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JAMES H. McKENNA,
Clerk.

In the Supreme Court
of the United States.

MERRIMACK RIVER SAVINGS BANK, *Appellant*,

vs.

THE CITY OF CLAY CENTER, KANSAS, A MUNICIPAL CORPORATION, GEO. W. HANNA, MAYOR OF SAID CITY, O. L. SLADE, G. P. RANDALL, W. D. VINCENT, L. BRIGHTWESER, E. D. HARTWELL, AND S. D. TRIPP, COMPOSING THE CITY COUNCIL OF SAID CITY, AND THE CLAY CENTER LIGHT AND POWER COMPANY, A CORPORATION, *Appellees*.

No. 604.
October Term, 1910.

Petition of Merrimack River Savings Bank, the above-named Appellant, for Citation in Contempt.

C. C. COLEMAN,
D. R. HITE,
F. L. WILLIAMS, AND
MULVANE & GAULT,
Attorneys for Appellant,
Merrimack River Savings Bank.

CRANE & CO., TOPEKA

In the Supreme Court
of the United States.

MERRIMACK RIVER SAVINGS BANK, *Appellant*,

vs.

THE CITY OF CLAY CENTER, KANSAS, A MUNICIPAL CORPORATION, GEO. W. HANNA, MAYOR OF SAID CITY, O. L. SLADE, G. P. RANDALL, W. D. VINCENT, L. BRIGHTWESER, E. D. HARTWELL, AND S. D. TRIPP, COMPOSING THE CITY COUNCIL OF SAID CITY, AND THE CLAY CENTER LIGHT AND POWER COMPANY, A CORPORATION, *Appellees*.

No. 604.
October Term, 1910.

Petition of Merrimack River Savings Bank, the above-named Appellant, for Citation in Contempt.

The petitioner, Merrimack River Savings Bank, the above-named appellant, respectfully shows:

I.

That heretofore, in February, 1909, your petitioner duly commenced suit in equity in the Circuit Court of the United States, for the District of Kansas, against the above defendants; that by its bill of complaint your petitioner complained that the City of Clay

Center and the individual defendants were threatening to, and would unless they were restrained by injunction of the Circuit Court, tear down and destroy certain electric light equipment, then owned and operated by the Clay Center Light and Power Company, and consisting of poles, wires and other apparatus theretofore constructed and then situated upon and along the streets and highways of the City of Clay Center; that your petitioner was the owner and holder of a valid first-mortgage lien upon such property, and that its destruction would result in great and irreparable damage to your petitioner, for which it had no adequate remedy at law; that said electric light and power equipment had been constructed and was then used by the said Clay Center Light and Power Company, under proper authority duly granted, and that the threatened interference with such property by the City of Clay Center and the individual defendants was not justified by the laws of the State of Kansas. Your petitioner further alleged that by reason of certain grants to its mortgagor and his grantors, the city had entered into a contract which it was threatening to impair, and that the destruction of the property on which your petitioner depended for the satisfaction of its debt and lien would deprive your petitioner of its property without due process of law.

Your petitioner further shows to the court, that, responsive to the prayer of its said bill of complaint, there was issued out of the Circuit Court an injunction directed to the City of Clay Center and the individual defendants restraining them and each of them from in any manner whatsoever interfering with the property covered by the lien of your petitioner; that said injunction was duly served upon said City of Clay Center and the individual defendants, as will more precisely appear from the transcript of the record and proceedings in said Circuit Court in the suit in equity commenced therein by your petitioner.

That afterwards said City of Clay Center and the individual defendants herein interposed their demurrer to your petitioner's bill of complaint, and such proceedings were had in said Circuit Court, that your petitioner's bill of complaint was dismissed for want of jurisdiction. Your petitioner says that the decree of said Circuit Court dismissing your petitioner's bill of complaint was rendered on May 20, 1910, in the following words:

"DECREE.

And now, on this May 20th, 1910, this cause came on for final decree on the demurrer of the defendant City of Clay Center and the individual defendants above named to the second amended bill of complaint of the above-named complainant; and thereupon the

court, having considered the arguments of counsel, and being fully advised in the premises, finds that the allegations of said second amended bill of complaint are insufficient to confer jurisdiction on this court.

Now, therefore, it is by the court now here ordered, adjudged and decreed, that said demurrer be and the same hereby is sustained on the ground that the facts alleged in said second amended bill of complaint are insufficient to confer jurisdiction on this court; and,

It is further ordered, adjudged and decreed that said second amended bill of complaint as well as the original and amended bills of complaint, are hereby dismissed for want of jurisdiction; and,

It is further ordered, that, pending the appeal this day allowed to the Supreme Court of the United States, and until the determination thereof and the further orders of this court, the injunction heretofore issued in this cause be and the same hereby is continued in full force and effect, the said complainant having filed its bond as required by the order of this court allowing said appeal.

JOHN C. POLLOCK, Judge."

That upon the application of your petitioner and the giving of the bond required by the order of said Circuit Court, the aforesaid provision relating to the continuance of the injunction was inserted in said decree for the express purpose of protecting the property covered by your petitioner's mortgage, from the interference of the said City of Clay Center and said individual defendants, during the time necessarily required to

secure the judgment of this court upon the question presented by the said demurrer to your petitioner's bill of complaint.

That afterwards your petitioner duly presented to said Circuit Court its petition for the allowance of an appeal from said order and decree of May 20, 1910, and with such petition duly presented, also, its assignment of errors; that an appeal was duly granted to your petitioner by said Circuit Court upon the execution of the bond required in that behalf, and a citation of this court calling upon the said City of Clay Center and the said individual defendants to appear in this court and show cause, if any they had, why said appeal of your petitioner should not prevail, was duly served upon said City of Clay Center and said individual defendants, as required by law and the rules of this court; that afterwards, and within proper time, a duly certified transcript of the record and proceedings of said Circuit Court in connection with said suit in equity was duly filed in this court, and said appellees, the City of Clay Center and the individual defendants, duly entered their appearance in this court as such appellees, and from and after June 13, 1910, your petitioner had in this court an appeal pending in and by virtue of the provisions of the act of Congress conferring jurisdiction upon this court to entertain appeals

in all cases where the jurisdiction of the Circuit Courts of the United States is drawn into question; and your petitioner avers that this court had jurisdiction of said appeal, and that the same has been pending before this court ever since June 13, 1910.

Your petitioner respectfully shows to the court that on October 24, 1910, this court entered its order dismissing the appeal of your petitioner, and soon thereafter your petitioner became advised of the entry of such order of dismissal; but your petitioner says that by the rule of this court said order of dismissal did not become final so as to deprive this court of jurisdiction of said appeal until the same was duly embodied in the mandate of this court directed to said Circuit Court and judicially and publicly informing said Circuit Court of such disposition of said appeal, and directing said Circuit Court as to its procedure relative to your petitioner's said suit in equity and said injunctional order. Your petitioner avers that according to the practice in this court as regulated by its rules, your petitioner was entitled to, and did, within the time provided by such rules, duly present to the justices of this court its petition for a rehearing, relative to this appeal, wherein your petitioner prayed that this court set aside its said order of October 24, 1910, dismissing your petitioner's appeal, for the reason and

upon the grounds stated in said petition. And your petitioner avers that no mandate of this court confirming said order of October 24, 1910, has been issued, and that said petition for rehearing is now pending undetermined.

Your petitioner says that on November 18, 1910, the defendants, Geo. W. Hanna, O. L. Slade, W. D. Vincent, S. D. Tripp and George P. Randall, together with other persons, in the City of Clay Center, Kansas, about four o'clock in the morning of that day cut down about ten of the poles upon which the electric-light wires, used in connection with the property covered by your petitioner's mortgage, were supported, and tore down, cut and destroyed about 1000 feet of wire cable then stretched upon said poles, and so rendered property upon which your petitioner depends for the satisfaction of its mortgage debt utterly useless for the purposes for which it was designed and was then being used. And your petitioner says that the acts of the last-mentioned persons in so tearing down and destroying said property were in direct violation of the express terms of the order of injunction issued out of said Circuit Court, and by the provisions of said decretal order of May 10, 1910, duly continued in force until the final determination of your petitioner's appeal to this court; that said last-mentioned persons intended to, and did, by so

tearing down and destroying said property, render said electric-light and power plant entirely useless, so that the business upon which depended in large measure the value of said property, was so interrupted that the property upon which your petitioner has its mortgage has been seriously impaired, if not wholly destroyed.

Your petitioner says that some years ago said City of Clay Center entered upon the manufacture and distribution of electric light and power; that from time to time the Mayor of said city and the four individual defendants heretofore named have endeavored to break down the business conducted by means of the property covered by your petitioner's mortgage, and have openly asserted and do assert that by destroying the poles and wires in, upon and along the streets and highways of said city, said property would be rendered useless, its customers taken away, and all income therefrom stopped; and your petitioner says that the destruction of the said property by said last-mentioned persons was in furtherance of the design of said city and of said individual defendants to render said mortgaged property worthless and thereby compel inhabitants of the City of Clay Center who had used said property to resort to the electric-light and power plant of said City.

Your petitioner avers that on November 16, 1910,

notwithstanding your petitioner caused notice to be duly given to the Mayor of said city, Geo. W. Hanna, defendant herein, that said property should be protected from further depredation, said Geo. W. Hanna, O. L. Slade, W. D. Vincent, S. D. Tripp and George P. Randall, together with other persons, incited so to do by them, cut down destroyed and carried away other poles and additional wire, constituting parts of said electrical equipment and property covered by your petitioner's mortgage, and so interfered with and acted upon such property that the said electric light and power equipment as a means for furnishing electrical light and power to said inhabitants of said city was completely destroyed, and thereby your petitioner's security was greatly impaired. And your petitioner further says that said last named individual defendants well knew at the time of said acts that no mandate of this court disposing of said appeal had been issued and well knew of the pendency of your petitioner's appeal and that the same had not been disposed of by this court. Your petitioner respectfully presents herewith due and sufficient proof of the foregoing allegations relative to the destruction of said property by affidavit attached and made part hereof; and by reference directs the attention of this court to the transcript of

record forming a part of your petitioner's appeal now pending as aforesaid.

And thereupon your petitioner humbly prays that the defendants Geo. W. Hanna, O. L. Slade, W. D. Vincent, S. D. Tripp and George P. Randall, individual defendants herein, be cited and admonished to appear before this honorable court at a time to be stated in the citation, and there and then show cause, if any they have, why they should not be proceeded against as for contempt of this honorable court. And your petitioner, as in duty bound, will ever pray.

C. C. COLEMAN,
D. R. HITE,
F. L. WILLIAMS, AND
MULVANE & GAULT,
Attorneys for Appellant,
Merrimack River Savings Bank.

STATE OF KANSAS, COUNTY OF SHAWNEE, SS.

F. L. Williams, of lawful age, being first duly sworn, upon his oath says that he is one of the attorneys for the above-named appellant; that he is a resident of Clay Center, Clay County, Kansas; that he has read the above and foregoing petition and knows the contents thereof, and further says that all allegations contained therein are true.

F. L. WILLIAMS.

Subscribed and sworn to before me, this 1st day of December, 1910.

[SEAL.] W. R. BARRETT, Notary Public.

My commission expires on the 18th day of January, 1914.

In the Supreme Court
of the United States.

MERRIMACK RIVER SAVINGS BANK, *Appellant*, vs. THE CITY OF CLAY CENTER, KANSAS, A MUNICIPAL CORPORATION, GEO. W. HANNA, MAYOR OF SAID CITY, O. L. SLADE, G. P. RANDALL, W. D. VINCENT, L. BRIGHTWESER, E. D. HARTWELL, AND S. D. TRIPP, COMPOSING THE CITY COUNCIL OF SAID CITY, AND THE CLAY CENTER LIGHT AND POWER COMPANY, a CORPORATION, *Appellees*.	No. 604. October Term, 1910.

STATE OF KANSAS, SHAWNEE COUNTY, ss.

F. L. WILLIAMS, of lawful age, being first duly sworn upon oath, says:

That he is now, and for more than twenty four years past has been, a resident of the City of Clay Center, in Clay County, Kansas, and that during all of that time he has been a member of the bar of the State of Kansas and practicing his profession, as a lawyer, at said city; that he is one of the attorneys for the above-named complainant, The Merrimack River Savings Bank; that he knows the property which is the subject of litigation in the action above entitled, viz., the

electric light and power plant at Clay Center, Kansas, which was erected, operated and maintained, under a certain ordinance which has been called the "Dexter Franchise"; and affiant further says, that said property is located, in part, upon the streets and alleys of the said City of Clay Center and has been so located for many years past.

Affiant further says, that for more than three years the said City of Clay Center, acting through its Mayor and Councilmen, has threatened to tear down and remove from the said streets and alleys the poles and the wires of the said plant, which constitute an essential part thereof. That on the 15th day of April, 1907, the said Mayor and Councilmen adopted the following resolution, to wit:

> "*Resolved*, That F. L. Williamson & Company and the Clay Center Light and Power Company be notified by serving upon them a certified copy hereof to forthwith take down and remove from the streets and alleys and public grounds of the City of Clay Center, all poles, wires and material of every kind belonging to them or either or any of them, pertaining to the electric plant heretofore claimed and operated by them as the successors and assigns of A. F. Dexter under said Ordinance No. 87, and unless they do so on or before the first day of May, 1907, the city will be compelled to remove the same in order to erect its own poles and wires for the lighting of the city by electricity.—Adopted by the City Council, April 15, 1907."

And affiant says that the Clay Center Light and Power Company named in said resolution is the same corporation that is named as defendant in the above entitled action, and that F. L. Williamson & Co., named in said resolution, is the grantor from whom the Clay Center Light and Power Company acquired title to the property which is the subject of ligitation.

Affiant further says, that he was in the City of Clay Center on the 16th day of November, 1910, and that at four o'clock in the morning of that day, about ten of the poles supporting a heavy copper wire cable, used in the operation of the light and power plant, which is the subject of the litigation, were cut off near the ground, with axes, and thrown upon the ground, bearing to the earth the wires which were supported by them, and the heavy wire cable was then cut into many pieces and actually severed in seven or eight places; that the length of the portion of the cable thus destroyed was about one thousand feet. And thereafter, on the same day, the Mayor and Councilmen of said city caused the pieces of wire cable and the pieces of other wires to be rolled into bundles and carried away and kept in the custody of the officers of the said city. Later, on the same day, other poles used in maintaining the plant and in carrying its wires, to the number of five or six, were cut off with axes and

the wires supported thereby were broken; that the power and capacity to furnish light and power from the said plant were thereby completely destroyed, and all of the users of light and power, who were the customers of the said electric light and power plant, to the number of two hundred and forty, were deprived of service and said plant and its owner and operator were deprived of all the income from the plant.

Affiant further says, that the persons who acted in cutting down the poles and in cutting the wires were David Tolles, then City Marshal of said city; Guy R. Martin, City Clerk of said city; S. D. Tripp, one of the Councilmen of said city; C. F. Rasmussen, an employé of said city; L. B. Smith, Toss Morey, Chauncey Bannister, Chas. Fager, Earl Witherell, and Roy Worley. And affiant says that the said persons were acting under the instructions and directions of Geo. W. Hanna, Mayor of said city, Stephen D. Tripp, W. D. Vincent, O. L. Slade, and Geo. P. Randall, Councilmen of said city, and that the said Mayor and Councilmen instructed and directed the said persons to destroy the property in the manner above set forth. And affiant says further, that on the same day the said Mayor and Councilmen caused to be published, over their signatures, in a newspaper published at Clay Center, Kansas, the following:

"*To the Taxpayers:*—In April, 1907, more than

three years ago, we served notice on F. L. Williamson & Co. and Clay Center Electric Light Company asking them to remove poles and wire from streets and alleys, their franchise having expired. All this time they have been trying to find a court to adjudge that Clay Center City has no right to remove the poles and wire. They have failed in every court. On October 24, 1910, the suit was dismissed in the Supreme Court at Washington, D. C., the first time we have not been under the injunction of the courts to prevent our moving same.

The Clay Center Electric Light Company has sold its interests to F. L. Williamson, so that another non-resident gets possession; and after due consideration and advice with taxpayers of the city, we instructed the Police Department to take wire and poles off the streets, which they commenced to do at 4 A. M.

We trust the friends of the city will approve of our action, as for the past three and one-half years we have tried to carry out instructions received at the various elections. We realize our action on such short notice will inconvenience some, but all have had fully three years in which to connect to the city plant, and those not now connected with the city plant will be connected as rapidly and with as little inconvenience as possible.

Geo. W. Hanna, Mayor;
Stephen D. Tripp,
W. D. Vincent,
O. L. Slade,
Geo. P. Randall,
Councilmen."

Affiant says that about the month of June, 1907, the said City of Clay Center completed the construction of an electric light and power plant owned by the city, and from that time the city became a distributor of light and power from its own plant, to the inhabitants of the city, and became and continued to be a competitor of the plant which is the subject of this litigation. That since the poles and wires were cut down, and the operation of the plant made impossible thereby, the said Geo. W. Hanna, Mayor of said city, has declared in substance, as affiant is informed and believes, that the purpose of the Mayor and Councilmen in cutting down the poles was to deprive the plant which is the subject of this action, of its income and divert the patronage and income enjoyed by it to the plant owned and operated by the city; that by so doing the increased revenues of the city would soon enable it to pay all damages which might accrue to the owner of the property in litigation, and that the loss of revenue to the city's competitor would compel it to cease to try to defend its property in the courts.

Affiant further says, that the said Geo. W. Hanna, Mayor, and Stephen D. Tripp, W. D. Vincent, O. L. Slade, and Geo. P. Randall, Councilmen, who authorized and directed the destroying of said property and who signed the statement published as above set forth,

are the same persons who are named in the above entitled action as defendants therein, and are the same persons who, as defendants, were enjoined by an order of the Circuit Court of the United States for the District of Kansas, in the above entitled action.

Further affiant does not say.

F. L. WILLIAMS.

Subscribed and sworn to before me by above-named F. L. Williams, this 1st day of December, 1910.

[SEAL.] W. R. BARRETT,
Notary Public.

My commission expires on the 18th day of January, 1914.

...the Supreme Court U. S.
FILED
JAN 23 1911
JAMES H. McKENNEY,
Clerk.

In the Supreme Court

of the United States.

MERRIMACK RIVER SAVINGS BANK, *Appellant,*

vs.

THE CITY OF CLAY CENTER, KANSAS, A MUNICIPAL CORPORATION, GEO. W. HANNA, MAYOR OF SAID CITY, O. L. SLADE, G. P. RANDALL, W. D. VINCENT, L. BRIGHTWESER, E. D. HARTWELL, AND S. D. TRIPP, COMPOSING THE CITY COUNCIL OF SAID CITY, AND THE CLAY CENTER LIGHT & POWER COMPANY, A CORPORATION, *Appellees.*

No. 604.
October Term,
1910.

Brief of Petitioner in Proceedings for Contempt.

C. C. COLEMAN,
D. R. HITE,
F. L. WILLIAMS, AND
MULVANE & GAULT,
Solicitors for Petitioner.

JANUARY, 1911.

CRANE & CO., TOPEKA

In the Supreme Court

of the United States.

MERRIMACK RIVER SAVINGS BANK, *Appellant,* vs. THE CITY OF CLAY CENTER, KANSAS, A MUNICIPAL CORPORATION, GEO. W. HANNA, MAYOR OF SAID CITY, O. L. SLADE, G. P. RANDALL, W. D. VINCENT, L. BRIGHTWESER, E. D. HARTWELL, AND S. D. TRIPP, COMPOSING THE CITY COUNCIL OF SAID CITY, AND THE CLAY CENTER LIGHT & POWER COMPANY, A CORPORATION, *Appellees.*	No. 604. October Term, 1910.

Brief of Petitioner in Proceedings for Contempt.

THE respondents named in the order made by this court, responsive to the petition of the appellant, to show cause why they should not be proceeded against as for a contempt, have filed their motion to set aside the order upon various grounds stated in the motion, and support their contentions by a printed brief which has been duly served upon counsel for the petitioner.

Perhaps it is unnecessary to point out that the petitioner in this proceeding is not to be considered as a complainant for its own benefit or advantage. It occupies the position of one who directs the court's at-

tention to certain acts of these respondents affecting the dignity and authority of the court for the purpose of invoking proper judicial action to support and protect that authority. Unfortunately the respondents seem to think the petitioner sustains a different relation to this proceeding, and therefore we have taken leave to draw the attention of the court to this matter. Our sole purpose must be, within the limitations of such proceedings, to give the court our best advice respecting the questions raised by the respondents' attack on its right to protect its appellate jurisdiction. And, it may be remarked, although this is entitled in the appeal of the petition from a final decree of a circuit court, this proceeding is, in fact, collateral to the appeal; as much so as though it had been formally instituted by the Department of Justice itself as an independent *quasi* criminal action begun by information or indictment against the respondents as defendants. It is, in our view, a wholly immaterial circumstance that the petitioner happens to be the appellant in the pending appeal; the complaint would be quite as effective if it had been made by a third party.

I.

The respondents have adopted the course usually pursued by persons charged with contempt who are unable to deny the accusation. Their motion performs

the functions of a demurrer, and their brief is founded upon a contention that this court is without jurisdiction upon the facts stated in the petition for the rule to show cause. In other words, the respondents say, as a cause why they should not be punished, that upon the admitted facts this court has no authority to punish them for contempt. Whilst admitting the willful destruction of the property which the appellant is seeking the aid of this court to protect, they deny the power of the court to afford protection to litigants pursuing their orderly course through the judicial department of the Federal Government for the vindication of their constitutional and statutory rights. The argument for the respondents comes to this: That where a circuit court denies the sufficiency of a bill in equity to invoke its jurisdiction on the ground that it does not disclose a case arising under the Federal Constitution, and for the protection of the complainant and upon sufficient security continues its injunctional order pending an appeal to this court, parties defendant to the bill may, notwithstanding such appeal and order, destroy the property and rights for the protection of which the injunction was expressly continued.

If this contention ripens into a rule of this court, it will certainly attract the amazed attention of litigants to the inadequacy of the protection afforded by such

procedure. Its importance invites very serious consideration of the argument and cases which are said to support it. This argument is divided by the respondents into three heads or topics. The first is, that no order of this court has been violated, and, therefore, it is asserted, this court cannot punish the respondents for a contempt of an order which it did not itself make. Counsel for the respondents point out that the only order which it is claimed has been violated, is the order of the Circuit Court enjoining them from interfering with the property covered by appellant's mortgage lien, and from this postulate they conclude that if they are in contempt of any court it is the Circuit Court and not this court. It is then argued that since the trial court had no jurisdiction of the case made by the appellant's bill, the order of injunction contained in the final decree from which the appeal is prosecuted is absolutely void, and a violation thereof is not punishable as for a contempt. From the foregoing postulate and argument, it results that if the positi n of the respondents is sustained, they cannot be punished by this court, because they have not violated any of its orders, and they cannot be punished by the trial court, because it did not acquire jurisdiction of the case in which the order violated was made. It is claimed by counsel for the respondent that these positions are sus-

tained by the authorities to which they refer. In the cases cited there will be found expressions to the effect that the appellate courts will not punish for contempt in such circumstances, but will leave the offenders to be dealt with by the court which made the order. There is no holding in any of these cases, as we understand them, that an appellate court has no jurisdiction to punish those who willfully prevent an effective determination of the rights of the appellants by destroying the property and rights upon which the final decision of the appellate court must operate. In some of them it is said that appellate courts are not equipped with proper means for the ascertainment of the facts, and such matters can be more satisfactorily determined in trial courts. In others it is held that appeals do not remove the controversy into the appellate court so as to deprive the trial court of its power to preserve the status of the property, but in none of them is it claimed that the court where the appeal is pending has no power to protect its own dignity and authority by punishing parties who by willfully destroying the property involved deliberately render it impossible for the appellate court to do justice in the case. In another place we cite many cases in which the jurisdiction of appellate courts to punish for contempt is upheld on grounds which seem to us incontrovertible. Upon

reason it would seem that no other conclusion should be reached. To hold that the trial court alone has power to protect property is to decide that it lies with the trial court to say whether the successful party in the appellate court shall have the fruits of his appeal; for, if the trial court holds that a destruction of the property is justifiable and refuses to punish the parties who destroy it, then the appeal is rendered wholly ineffectual and might as well be dismissed for want of a subject-matter upon which to operate. This is peculiarly the case in appeals in equity where the appellate court re-tries the case upon the record and directs what decree shall be rendered. The case at bar affords a conspicuous illustration of the argument against the position taken by our adversaries. The property destroyed by the appellants was used for the purpose of carrying on a business upon the continuance of which its value largely depended. Its destruction renders it impossible to carry on such business; so that if this court should reverse the trial court, and hold that the bill disclosed sufficient facts to confer jurisdiction to grant the relief, the trial court could not carry the mandate into effect by granting relief, for the all-sufficient reason that the property has been destroyed and the business no longer exists. In our opinion neither the trial court nor the respondents had

the right to determine whether the property should continue to be used for the purposes mentioned while this appeal was pending. To hold otherwise is to deny a right of appeal granted by section 5 of the Act of March 3, 1891, (Ch. 517, 26 Stat. L. 826.) By the first subdivision of that section, appeals may be taken from circuit courts direct to this court in "any case in which the jurisdiction of the court is in issue." But according to the views of counsel for the respondents, this court has no power to maintain the status of the case pending the appeal; that such power resides in the circuit courts after the appeal is taken, and that any interference with the property is not punishable by any court; and that whether such interference will result in preventing a determination of the question on appeal is a question wholly for the consideration of the Circuit Court and not of this court. We think the mere statement of the proposition shows its unsoundness. In our opinion this court is, of necessity, possessed of the power to so deal with the property as to make its final decision and judgment effectual. In other words, we believe that where an act of Congress gives this court jurisdiction to determine, in a given case, whether the Circuit Court should or should not take jurisdiction of a controversy, this court and not the Circuit Court is the tribunal clothed with authority

to maintain the status of the parties existing at the time the appeal was taken and thereby rendered it possible for its judgment and mandate to become effectual. This view is well expressed by the Court of Errors and Appeals in the case of *Penn. R. R. Co. v. National Docks Co.*, 54 N. J. Eq. 647, 654.

Another proposition advanced by counsel for the respondents is to the effect that the Circuit Court's order restraining any interference with the property pending the appeal is absolutely void. In our opinion, this proposition grows out of a mistaken idea respecting the character of the jurisdiction possessed by circuit courts. As early as the case of *McCormick v. Sullivant*, 10 Wheaton, 192-199, it was decided that judgment of a circuit court could not be collaterally attacked, notwithstanding the record failed to disclose sufficient jurisdictional allegations. In that case, speaking for this court, Mr. Justice WASHINGTON said:

"This reasoning proceeds upon an incorrect view of the character and jurisdiction of the inferior courts of the United States. They are all of limited jurisdiction, but they are not, on that account, inferior courts in the sense of those words, whose judgments, taken alone, are to be disregarded. If the jurisdiction be not alleged in the proceedings, its judgments and decrees are erroneous, and may, upon a writ of error or appeal, be reversed for that cause. But they are not absolute nullities."

In *Evers v. Watson*, 156 U. S. 527, this question again arose, and this court, speaking through Mr. Justice BROWN, said:

"But we do not wish to be understood as holding that, even if jurisdiction had not been apparent upon the record, advantage could be taken of it after a final decree and not a collateral proceeding."

Citing *McCormick v. Sullivant*, 10 Wheaton, 192; *Ex parte Watkins*, 3 Peters, 193; *Kennedy v. Bank*, 8 Howard, 586; *Des Moines Co. v. Homestead Company*, 123 U. S. 552; and *Dowell v. Applegate*, 152 U. S. 327; where the cases are collected, and the conclusion reached that if jurisdiction does not appear, the judgment or final decree of the Circuit Court cannot, for that reason, be collaterally attacked or treated as a nullity. In the case last cited, the question was whether the bill disclosed a case arising under the laws of the United States, and this court, speaking through Mr. Justice HARLAN, said (p. 340):

"But that was a question which the Circuit Court of the United States was competent to determine in the first instance. Its determination of it was an exercise of its jurisdiction even if that court erred in entertaining jurisdiction. Its determination of that matter was conclusive upon the parties before it and could not be questioned by them or either of them collaterally or otherwise than on writ of error or appeal to this court. . . . The decision of that question was the exercise

and the rightful exercise of jurisdiction, no matter whether in favor of or against taking the cause; whether its decision was right, in this or any other respect, was to be determined by this court on appeal."

Many other decisions by this court might be cited to the same effect. In our opinion the result of these cases is that the Circuit Court having passed upon the question before it and a right of appeal being given from its decision, neither the Circuit Court nor the parties had any right to determine any question concerning this matter until the judgment and mandate of this court had been taken. According to the views of counsel for the respondents, if the Circuit Court had issued a rule to show cause why they should not be proceeded against as for a contempt, it would in that proceeding have jurisdiction to finally determine its own jurisdiction, notwithstanding that question was pending before this court in this appeal. Moreover, the result of their contention is, that if in such contempt proceeding in the Circuit Court, that court had determined against its own jurisdiction, such a decision would be final, and in that manner the appellate jurisdiction of this court completely ousted. Whatever may be the rule in other jurisdictions, it is well settled in the Federal practice that judgments and final decrees rendered by circuit courts cannot be attacked col-

laterally in such cases as the one at bar. There may be cases such as *In re Sawyer*, 124 U. S. 200, where it was determined that a circuit court had no jurisdiction to retain a bill in equity to restrain the mayor and council of a city from removing an officer for malfeasance in office; but we know of no case decided by this or any other Federal court which decides that a judgment or final decree of a circuit court on a bill in equity brought by a mortgagee to protect the mortgaged property from spoliation has been held void in the sense contended for by counsel for the respondents, because the record did not disclose on its face, facts sufficient to show a case arising under the laws of the United States. In another place we refer to the cases sustaining these views.

IS THIS COURT WITHOUT JURISDICTION TO PUNISH RESPONDENTS FOR A VIOLATION OF THE INJUNCTIONAL ORDER ON THE GROUND THAT SUCH JURISDICTION IS IN THE CIRCUIT COURT WHICH ISSUED THE ORDER?

The contention of respondents is that this court is without jurisdiction to punish for any violation of any injunctional order issued by the Circuit Court. Many cases are cited in their brief for the purpose of supporting that contention. We have examined the au-

thorities that are cited by respondents, and as we read them and understand them two only of the courts whose opinions are cited have held that the sole jurisdiction to punish for contempt for violating an injunctional order after an appeal, is in the trial court to the exclusion of the appellate court. The decisions in several of the cases cited sustain the right of the trial court even after appeal to punish for contempt in violating injunctional orders, but the courts of two States only have held that the jurisdiction so to punish is with the trial court to the exclusion of the appellate court, while the appeal is pending. These two exceptions are West Virginia and Illinois. The Illinois decision is quoted extensively in respondents' brief at pages 25 to 28 inclusive, and the cases from West Virginia are cited and quoted at pages 18, 19, 24 of respondents' brief.

The decisions of West Virginia and Illinois which are relied upon must be considered as qualified authority because of the fact that each of them recognizes a distinction to be drawn between the status of a case appealed from a judgment granting a final injunction and an appeal from a judgment dissolving and denying an injunction. In the decision cited and relied upon from the West Virginia court, we find this authority quoted with evident approval: "Where there is a dissolution "and an appeal and supersedeas, *State v. Bridge Com-*

"*pany*, 16 W. Va. 864, holds that such contempt pro-"ceedings must be in the appellate court." And therefore it seems that even in West Virginia where an appeal is taken from a judgment dissolving an injunction which is continued in force pending appeal, the jurisdiction to punish for violation of the injunctional order is in the appellate court. The Illinois case cited and relied upon contains this statement: "Even "if an injunction is dissolved on final hearing and is "continued by order of the appellate court pending "the appeal, the injunction is still that of the court from "which the appeal was taken." This statement in the Illinois decision is only a *dictum*, for the reason that the case pending before the court was one in which there was an appeal from a judgment granting a final injunction.

As we read and understand the decisions which are cited and relied upon by appellants, all of them are based upon cases in which a final judgment was rendered by the trial court and an appeal taken therefrom, and among them all there is not one in which there was an appeal from a judgment denying or dissolving an injunction.

The case of *Gates v. McDaniel*, 4 Stew. & P. (Ala.) 69, we do not regard as an authority in this case, for the reason that it appears from the reading of the

opinion that the case had been finally disposed of by the Supreme Court, and that it was no longer pending there when the violation of the orders complained of occurred.

The distinction which must be borne in mind between the case where the trial court has rendered a final judgment and granted a permanent injunction and a case where the trial court has dissolved or denied an injunction, lies in the fact that where the trial court has granted a final injunction and rendered its judgment thereon, it is the duty of the trial court to preserve it and all rights in respect thereto until it is reversed, while the continuing of an injunction in effect, during appeal, after a permanent injunction has been denied and a temporary injunction dissolved, is only for the purpose of preserving the status of the property pending the appeal, and is ancillary to the exercise of the appellate jurisdiction, and it is intended to serve no other purpose. Authorities showing the practice and sustaining the power of the appellate courts to punish contemptuous conduct in violating the orders of the trial court are abundant, and we cite from them the following:

"Where an appeal has been taken to a higher court and such court obtains jurisdiction, all contempts committed thereafter relating to such proceedings are

punishable by the latter court, but where the steps to have the proceedings reviewed do not constitute a stay or supersedeas and the jurisdiction remains in the trial court, the latter court possesses power to punish contempts growing out of the proceedings." (9 Cyc. 32.)

In a Colorado case, pending an appeal, the appellant sought to violate the decision of the trial court, which was against his contention, and he was held to be guilty of contempt of the appellate court. We quote from the opinion as follows:

"If, after having perfected an appeal and submitted himself and cause to the appellate court, appellant takes the matter into his own hands and proceeds to act contrary to the judgment of the court below by taking possession of the matter in controversy which has been adjudged against him, there is no living issue or question actually in dispute for the appellate court to pass upon. To do so and continue to prosecute in the appellate court is a disrespect of the appellate court which convicts the plaintiff in error of at least a technical contempt of court and merits punishment.

"No authorities directly in point have been cited and diligent search has discovered none.

"In *People v. District Court, supra,* it was said: 'It may be that no authority can be found which can be said to be directly in point, because none have been cited wherein the facts are the same as those now under consideration. This can doubtless be explained upon the hypothesis that no litigant has ever had the te-

merity to assume the position that he had the right to take steps such as the relators have taken in the circumstances of this case.'

"The foregoing language is pertinent to the case in hand, as also the following: 'The prime object in having judicial tribunals is to provide a method whereby all citizens, whoever they may be or whatever their standing, may have their disputes settled in an orderly and peaceful manner. Parties cannot take the law into their own hands and settle their rights according to their own notions of what is right and wrong. Courts are instituted for the purpose of settling controversies which disputants are unable to amicably arrange between themselves, and all must recognize this fact.' " (*People v. Horan*, 34 Colo. 304, 338.)

In a Michigan case judgment was rendered granting a permanent injunction, and pending the appeal the defendant violated the provisions of the injunction, and upon complaint made in the appellate court was adjudged to be guilty of contempt of the appellate court. We quote from the opinion as follows:

"There can be no doubt that the effect of the appeal is to bring the case into this court and to stay all proceedings in the Circuit Court. . . . It does not follow, however, that where an appeal is taken from a decree granting an injunction that the terms of the injunction may be ignored." (*Wilkinson v. Dunkley-Williams Company*, 141 Mich. 409.)

"The violation of an injunction pending an appeal from a judgment perpetuating the injunction is a

contempt of the appellate court and punishable as such." (*Kentucky and Indiana Bridge Company v. Krieger*, 91 Ky. 625.)

We quote from the West Virginia case heretofore cited, as follows:

"Supposing that the *supersedeas* awarded by this court was in full operation and effect, when it was disregarded by the defendants, the first question to be determined is, whether such conduct by the defendants would be a contempt of this court, of the Circuit Court of Jefferson county, or of the county court of Jefferson county. The general rule of course is that where a *supersedeas* is issued, or any order is made by this court, and it is disobeyed, such disobedience is a contempt of this court. See *McLaughlin v. Janney*, 6 Grattan, 609; *Smith v. Caldwell*, Sneed, (Ky.) 341." (*State v. Bridge Company*, 16 W. Va. 874.)

In a Texas case parties were enjoined from selling certain railroad tickets, and appealed to the Court of Civil Appeals, and while the appeal was pending violated the injunction and were punished for contempt of the Court of Civil Appeals by that court. We quote from the syllabus of the case, as follows:

"Where, with full knowledge of an injunction issued by the district court enjoining defendant, his agents, etc., from selling certain railroad tickets, and that his sale of such a ticket would be a violation of the injunction, defendant's agent willfully sold such ticket pending an appeal from the injunction, the Court of Civil

Appeals had jurisdiction, and could punish the agent as well as the principal for contempt." (*Lytle et al. v. Railroad Co.*, 90 S. W. Tex. 316.

In the case of *State ex rel v. Campbell*, 25 Mo. App. 640, that court sustained the right of the appellate court to punish for contempt of violation of the injunction granted by the trial court, and while the decision in that court was reversed by the Supreme Court for a want of jurisdiction, which did not directly involve the injunction nor the contempt proceedings, so that we do not rely upon it as an authority, yet the language of the court is so clear in giving the reasons for holding that the appellate court has jurisdiction, that we quote from the syllabus and opinion as follows:

"Pending an appeal from the dissolution of an injunction the court appealed to has jurisdiction to prevent and deal with a violation of it."

"Proceedings for a contempt are not intended to vindicate the personality of the judge whose order is disobeyed, or even merely the court over which he presides, except in so far as either represents the sovereign power of the state, in its administration of justice to the citizen. The sovereignty never sleeps, and never fails of its own vindication for want of a proper instrument; such an instrument is always to be found in a court wherein a cause is pending whose exigencies demand the interposition of the sovereign authority against an infraction of the law. . . . We can not entertain a doubt, that, with the pendency

of the original cause in this court there inheres in this court an original jurisdiction over the parties 'to maintain, unchanged, the status, or condition of the subject-matter of the controversy during the pendency of the suit,' and that the exercise of that jurisdiction as demanded in the present instance is 'essential to the attainments of the object of litigation and the ends of justice.'" (*State ex rel. v. Campbell*, 25 Mo. App. 635, 640.)

In the case decided by the Court of Civil Appeals of Texas in 1896, a street car company, having accepted a franchise to operate its lines upon certain streets was made defendant in the trial court in an action in mandamus to compel it to continue operating its cars, and from an order granting a mandamus by the trial court an appeal was taken to the Court of Civil Appeals. Pending the appeal the defendant railway company caused a portion of its tracks to be torn up. The officers and agents of the company were cited and punished for contempt of the Court of Civil Appeals. We quote from the opinion as follows:

"The appeal from the trial court removed the cause from that court, and placed it, with the parties, as well as the subject-matter of the litigation, wholly within the jurisdiction of this tribunal; but the judgment of the district court is not affected by the appeal further than that the proceedings to enforce it are stayed,—a supersedeas bond having been filed. It is evident that the destruction of the railway by tearing up the track would

place it beyond the power of the company to comply with the judgment of the district court compelling it to operate the road; and it is equally clear that the officers of the company, whatever may have been their motive in tearing up the track, knew that this would be the effect of it. From this it necessarily follows that the officers of the company who controlled and managed its affairs were, in ordering the destruction of property brought within its jurisdiction, in contempt of this court." (*San Antonio St. Ry. Co. v. State*, 38 S. W. [Tex.] 54, 59.)

The Court of Errors and Appeals of the State of New Jersey points out and demonstrates the weakness of procedure if it is to be held that the trial court alone has the right to the exclusion of the appellate court to punish for violation of injunctional orders, while the appeal is pending. The substance of the conclusion reached by the court in the opinion referred to is, that giving to the trial court the sole right to punish for contempt, would give to the trial court discretion and power to control in a measure the jurisdiction of the appellate court. The reasoning is so clear and strong that we quote extensively from the opinion:

"Touching the contention which occupied so much space in the briefs of counsel, that a power rests in the discretion of the chancellor to execute or to refrain from executing the decree in his court during the pendency of the appeal, the conclusive answer is that such a function would be wholly inconsistent with the para-

mount cognizance given to this court over the subject. Such a theory would have the effect of reducing the absolute right of appeal, so clearly created by the statute, to a merely conditional right, such condition being the pleasure of the chancellor. If the inferior court can destroy the subject of the appeal, it necessarily follows that the remedy is not of right but of grace. By acceding to such a doctrine this court would abnegate the greater part of its authority in this domain vested in it by the legislature and the constitution. That such would be the result the present case exhibits a conspicuous proof. The decree, as it stood when the appeal was filed, enjoined the appellant to refrain from opposing the cutting of its tracks, and to facilitate such cutting by the removing out of the way certain of its trains. To prevent such cutting, which the appellant claimed would be an irreparable injury, this appeal was interposed, but the chancellor maintained that, unless he himself intervened, the decree was in full force and must be in all respects submitted to. In other words, the judicial doctrine was that, although the appellant had taken the proper steps to place before this court the question whether such cutting was justifiable, nevertheless the appellant must stand by and quietly submit to the destruction of the ground of its appeal, and must even actively assist in such destruction.

"I think it clear that such an hypothesis as this is a manifest invasion of the rightful jurisdiction of this court, for it deprives it of the ability to render anything more than a merely nominal decree in the given case.

"In the case before us, therefore, the opinion of this court is that the decree in question lost for the time all

its force, and that the appellant could not fall into contempt by resisting its execution.

"It is likewise the opinion of this court that an appeal in all cases will have that effect given to it which shall be necessary to preserve the subject to which the appellate procedure relates, in such a condition as will enable this court to render an efficacious decree in the premises. That for this purpose an injunction decree will be suspended or continued, or a previous injunction revived, by the act of filing an appeal whenever such construction shall be necessary for the end just stated.

"Let the decree before us be reversed." (*Penna. R. R. Co. v. Nat. Docks Ry. Co.*, 54 N. J. Eq. 647, 654.)

In Florida it has been decided that:

"When an appeal is taken and a supersedeas allowed from an order appointing a receiver, *pendente lite*, the power of the court making the order and its officers is suspended in reference to the order appealed from, and the order remains inoperative pending the appeal. Any action or proceeding by any person under such order, in disregard and defiance of the force and effect of the supersedeas, after notice thereof or after service of a writ of supersedeas, is a contempt of the authority and jurisdiction of the appellate court." (*The State v. Johnson*, 13 Fla. 33.)

EVEN IF THE CASE IS ONE WHICH THE COURT IN WHICH IT IS PENDING EVENTUALLY DETERMINES THAT THERE IS WANT OF JURISDICTION, THE INJUNCTIONAL ORDERS OF THE COURT ARE NOT THEREFORE VOID.

In a case decided by the Supreme Court of Pennsylvania, one Williamson interfered with the possession of slaves in the custody of their master. The master sought the possession of his slaves by writ of habeas corpus directed to Williamson. For refusal to comply with the writ Williamson was adjudged quilty of contempt of court, and thereupon sought to obtain his release from the judgment by writ of *habeas corpus* from the Supreme Court of Pennsylvania. His reliance was upon the claim that the Federal District Court which committed him for contempt was without jurisdiction to hear the matter which was pending before it at the time that he was adjudged guilty of contempt. We quote from the decision of the Supreme Court of Pennsylvania:

"But certainly the want of jurisdiction alleged in this case would not even have been a defense on the trial. The proposition that a court is powerless to punish for disorderly conduct or disobedience of its process in a case, which it ought ultimately to dismiss for want of jurisdiction, is not only unsupported by judicial authority, but we think it is new even as an argument at the bar. We ourselves have heard many cases

through and through before we became convinced that it was our duty to remit the parties to another tribunal. But we never thought that our process could be defied in such cases more than in others.

"There are some proceedings in which the want of jurisdiction would be seen at the first blush; but there are others in which the court must inquire into all the facts before it can possibly know whether it has jurisdiction or not. Any one who obstructs or baffles a judicial investigation for that purpose is unquestionably guilty of a crime for which he may and ought to be tried, convicted, and punished." (*Passmore Williamson's Case*, 26 Pa. St. 9, 21.)

A similar case was before the Supreme Court of Mississippi. We quote from the opinion as follows:

"It will not avail the offender that the order was improvidently made upon insufficient grounds, and would be reversed by a higher tribunal; nor that the court issuing it was not justified in making the particular order that was disobeyed, but should have made another and a different one. Neither can he urge that, upon the allegations contained in the application for the order, no facts were stated which made out a case against him or entitled the applicant to any relief. All these are matters to be considered by the court that makes the order, and by the tribunal which reviews its action on appeal; but they can not be decided by the party himself. It is sufficient for him that a court, which by the laws of his country had the right to consider the subject, has passed its judgment upon it. If that judgment be wrong, he must ask its correction where it was rendered, or appeal to some higher power

for relief. If, instead of doing this, he determines to disregard it and take the consequences, he can make those consequences innocuous only by showing that there was an inherent want of jurisdiction in the court to make any order whatever on the subject.

"The want of jurisdiction here referred to is something widely different from the sense in which the words are used when we say that a court of law has no jurisdiction to settle a partnership account, or that a court of equity can not entertain a suit sounding wholly in damages; because it frequently admits of doubt, in the inception of a litigation, whether the particular suit before the court should not have been instituted in some other tribunal; and while the court is considering this question and evolving the facts necessary to its determination, its authority must be respected and its orders obeyed. When we say that a person may safely disobey the commands of a court which is without jurisdiction to issue them, we mean either that it has failed to give, or is incapable for some reason of giving, legal notice to the person whose rights are to be affected, or that the subject-matter of the controversy is one which that court has no right to consider in any aspect whatever. Thus, if a court of law should assume jurisdiction of a suit for divorce, and issue an order for alimony *pendente lite*, the person against whom it was entered might safely disregard it. So, if a court of chancery should undertake to interfere in any way with a criminal prosecution, or to enjoin a convicted person from asking for an executive pardon, its action would be utterly null, and might be so treated by every one. These illustrations enable us to appreciate the difference between that class of cases

where there may or may not be jurisdiction—according as a full development of the facts may show that relief is to be sought in the one forum or the other, and where consequently it is the duty of the court first applied to to have the facts developed, with a view of determining the question of jurisdiction—and that other class of cases where it is at once perceived, from a mere mention of the subject-matter of controversy, that no condition of facts can give jurisdiction. In the one case, the orders of the court must be respected. In the other they may be treated as the impotent commands of a private person masquerading in the guise of judicial authority." (*Ex parte Wimberly*, 27 Miss. 437, 444.)

As bearing upon the question of jurisdiction we cite the following from a case decided by the Supreme Court of Illinois:

"Jurisdiction of the particular matter does not mean simple jurisdiction of the particular case then occupying the attention of the court, but jurisdiction of the class of cases to which the particular case belongs: *State v. Wolover*, 127 Ind. 306, 26 N. E. 762; *Jackson v. Smith*, 120 Ind. 520, 22 N. E. 431; *Fields v. Maloney*, 78 Mo. 172; *Dowdy v. Wamble*, 110 Mo. 280, 19 S. W. 489. Whether a complaint does or does not state a cause of action is, so far as concerns the question of jurisdiction, of no importance, for if it states a case belonging to a general class over which the authority of the court extends, then jurisdiction attaches and the court has power to decide whether the pleading is good or bad." (*Franklin Union No. 4 v. People*, [Ill.] 110 Am. St. Rep. 255.)

As defining "subject-matter" for the purpose of determining jurisdiction, we cite and quote from three Missouri cases, as follows:

"The Circuit Court at that time certainly had jurisdiction of the subject-matter of the pending action, by which is meant that that court had jurisdiction of causes of the general class to which that action belonged. Having jurisdiction of the subject-matter, all that was further necessary to complete the court's jurisdiction in the particular case was to obtain jurisdiction over the parties to it." (*Posthlewaite v. Ghiselin*, 97 Mo. 424.)

"The Circuit Court, in the case in question here, had power to entertain proceedings of the general class to which that case belonged, namely, of proceedings for the condemnation of property to public use. It, therefore, had jurisdiction of the subject-matter. *Posthlewaite v. Ghiselin*, 97 Mo. 424." (*State, ex rel. Union Depot Ry. Co., v. Southern Ry. Co.*, 100 Mo. 61.)

"In *Rosenheim v. Hartsock* (1886), 90 Mo. 365, this court, speaking by Judge Sherwood, defined jurisdiction of the subject-matter of a cause as jurisdiction 'of all similar actions.' In *Posthlewaite v. Ghiselin* (1889), 97 Mo. 424, it was held to mean 'jurisdiction of causes of the general class to which that action belonged.'" (*Dowdy v. Wamble*, 110 Mo. 284.)

On the same subject we quote from the syllabus of an Indiana case:

"A court of limited jurisdiction has jurisdiction of the subject-matter in a given case if it has jurisdiction

of the class of cases to which the particular case belongs." (*State, ex rel. Egan, v. Wolever et al.*, 127 Ind. 306.)

In support of the proposition that the power and authority of the court to maintain the status of the property pending the litigation, even though jurisdiction may eventually be denied, we quote again from the opinion in the Shipp case:

"We regard this argument as unsound. It has been held, it is true, that orders made by a court having no jurisdiction to make them may be disregarded without liability to process for contempt. *In re Sawyer*, 124 U. S. 200; *Ex parte Fisk*, 113 U. S. 713; *Ex parte Rowland*, 104 U. S. 604. But even if the circuit court had no jurisdiction to entertain Johnson's petition and if this court had no jurisdiction of the appeal, this court, and this court alone, could decide that such was the law. It and it alone necessarily had jurisdiction to decide whether the case was properly before it. On that question, at least, it was its duty to permit argument and to take the time required for such consideration as it might need. (See *Mansfield, Coldwater & Lake Michigan Ry. Co. v. Swan*, 111 U. S. 379, 387.) Until its judgment declining jurisdiction should be announced, it had authority from the necessity of the case to make orders to preserve the existing conditions and the subject of the petition, just as the state court was bound to refrain from further proceedings until the same time. Rev. Stat., § 766, act of March 3, 1893, c. 226, 27 Stat. 751. The fact that the petitioner was entitled to argue his case shows, what needs no proof,

that the law contemplates the possibility of a decision either way, and therefore must provide for it. Of course the provision of Rev. Stat., § 766, that until final judgment on the appeal further proceedings in the state court against the prisoner shall be deemed void, applies to every case. There is no implied exception if the final judgment shall happen to be that the writ should not have issued or that the appeal should be dismissed." (*United States v. Shipp*, 203 U. S. 563, 573.)

IT IS CONTEMPT OF THE COURT IN WHICH AN ACTION IS PENDING FOR A LITIGANT TO DESTROY, REMOVE, OR CONCEAL THE SUBJECT OF THE LITIGATION, OR DO ANY OTHER ACT IN RESPECT TO THE SUBJECT OF THE LITIGATION, WHICH MAY RENDER NUGATORY THE DECISION OF THE COURT.

The principle upon which the foregoing proposition rests is so admirably expressed in the decision of this court in the Debs case that we quote the language of that decision here:

"We yield to none in our admiration of any act of heroism or self-sacrifice, but we may be permitted to add that it is a lesson which cannot be learned too soon or too thoroughly, that under this government of and by the people the means of redress of all wrongs are through the courts and at the ballot-box, and that no wrong, real or fancied, carries with it legal warrant to invite as a means of redress the coöperation of a mob,

with its accompanying acts of violence." (*In re Debs, Petitioner*, 158 U. S. 564, 598.)

"It is contempt to willfully destroy, remove, conceal, or dispose of the subject-matter of the litigation pending the proceedings. The doctrine applies to both persons and property." (9 Cyc. 8.)

In support of the proposition we cite a Federal decision rendered by Circuit Justice TANEY. The facts in the case, in substance, are that the claimant of a trust fund brought suit against the trustee to recover it and to require it to be paid into court pending litigation. The trustee answered, admitting the possession of the fund, and afterwards, before an order was made requiring that the fund be paid into court, disposed of the fund to claimants adverse to the plaintiff in the suit. In doing so the trustee undertook to decide for himself the question as to who were the rightful claimants of the fund. We quote portions of the opinion:

"Now, whether the complainant was or was not the child of John K. Wartman, is a question for the court to decide, upon the final hearing of the cause, and not for the defendant; it is the very matter in issue. The defendant admitted that the trust fund was in his hands when he filed his answer to the bill, and he knew that the application made in the bill, for an order upon him to bring the money into court, upon the ground that it was insecure in his hands, was pending before the court

and awaiting its decision. And he now offers as a justification for his refusal to pay it into court, that, in his judgment, the complainant was not entitled to it, and that he had, therefore, paid it to those whom he considered entitled, regardless of any order the court might pass for the security of the fund, pending the controversy. In other words, that he had decided the matter in dispute for himself, and had determined to evade and defeat any order the court might make for the security of the fund, by paying it over to others, and thus putting it out of the reach of the process of the court." (*Wartman v. Wartman*, 29 Fed. Cases, 303, No. 17,210.) . . . "And if he was not able, at the time he distributed it, to replace it, in case the court should order it to be brought into court, or should finally decree in favor of the complainant, the distribution he made was not only in contempt of the authority of the court, but a fraudulent attempt to defeat the just rights of the infant complainant, if the decision should be ultimately in his favor. . . . And the court would be forgetful of its duty, and surrender its whole power over trustees and trust property, if it failed to enforce its orders for the security of a trust fund, admitted to be in the hands of the trustee, when he answered, and deemed to be unsafe in his possession; for a final decree would be idle and nugatory, if, pending the litigation, a fraudulent trustee was left at liberty to waste or misapply the trust property, or place it beyond the reach of the process of the court. Certainly, this case, as it now stands, is not one in which the court would be disposed to depart from the ordinary course of chancery proceeding; for upon comparing the various answers and affidavits of the de-

fendant, the conclusion seems to be irresistible, that this fund was partially paid away, and the residue applied to the defendant's own use, not only in contempt of the authority of the court, but for the purpose of defrauding the infant complainant of his just rights, if the decision of the court should be ultimately in his favor." (*Wartman v. Wartman*, 29 Fed. Cases, 303-306.)

We cite also the syllabus in another case, as follows:

"An attachment of contempt will lie against a master who attempts to remove his slave out of the jurisdiction of the court after he has notice or knowledge of the slave's petition for freedom; and the court will also order the slave to be brought into court by the marshal, that he may be protected." (*Richard v. Van Meter*, 20 Fed. Cas. 682, No. 11,763.)

In a case decided by the Supreme Court of Montana, the chief of police and his subordinates, who had knowledge that a writ of habeas corpus had been issued for a prisoner under their control, endeavored to avoid the service and execution of the writ and aided in delivering the prisoner into the custody of a messenger of the governor of another State under extradition process, were held to be guilty of contempt of court. (*State, ex rel. Morse, v. Dis. Ct.*, 29 Mont. 230.)

In California an execution issued against a judgment debtor had been returned wholly unsatisfied, and he was cited to appear before a referee to answer concerning his property in pursuance of the provisions of the

code of civil procedure. During the examination he testified that he owned and possessed certain personal property. Whereupon the judgment creditor moved for an order directing the delivery of the property to the sheriff who had in his hands an *alias* execution. The referee took the motion under advisement, and, in anticipation and for the purpose of defeating the order prayed for, the petitioner disposed of the property. He was adjudged guilty of contempt of court, and upon appeal to the Supreme Court the judgment was affirmed. The substance of the findings of the trial court, upon which the judgment was based, is contained in the opinion, from which we quote:

"That the delivery of the property by petitioner [judgment debtor] . . . was made in anticipation of and for the purpose of defeating the order Rankin had asked for, and that to accomplish his purpose to defeat the process of the court petitioner had procured upon his own motion a delay in the proceedings, pending which he voluntarily and contumaciously disabled himself from complying with the order he anticipated being made, and finally that his action 'was but a bold attempt to defeat the order of the referee, duly and properly made, and cause the plaintiff's proceedings to be barren of any result.' Finding such facts, the Superior Court rightly adjudged petitioner guilty of contempt, and imposed upon him appropriate punishment." (*Ex parte Kellogg*, 64 Cal. 343, 344.)

In a case decided by the Appellate Court of the State of Illinois, the custody of a minor child was drawn into controversy in an action for divorce. Each party sought from the court a judgment for the custody of the child. The defendant, having possession and control of the infant, concealed its whereabouts and refused to reveal the place where it was kept. On being adjudged guilty of contempt of the trial court, the contemnor appealed to the Appellate Court, where the judgment was affirmed, and from the decision there rendered we quote:

"The position of appellant, here taken, is that in divorce proceedings, when the court is called upon and feels bound to discharge its duty in this regard, a parent having spirited an infant away and keeping it hid, may refuse to give any information that will enable the court intelligently to discharge its duty, that he or she may constitute himself or herself the judge of what is best for the minor, excluding the court and the other parent from not only all communication with the child, but putting it beyond the power of the court to make any order, judgment or decree concerning the welfare of the infant, which shall be other than a vain and idle proceeding, save as the parent who alone knows where it is, may will." (*Cottier v. The People*, 61 Ill. App. 17, 30.)

In a New York case, one Kearney by habeas corpus sought and acquired possession of two minor children. Proceedings were prosecuted on *certiorari* to the Su-

preme Court, and while the proceedings were pending, Kearney removed the children beyond the jurisdiction of the court and left them with a sister in Ireland. We quote from the opinion, as follows:

"I do not doubt—no one who reads these proceedings and his answers can have any doubt—that he removed the children to a distant country, where the laws of this state and the process of its courts are without power and authority, so that in the event of a restitution being awarded to the relators he might disregard and disobey with impunity both the law and the process of the courts. He could have had no other motive. No sufficient reason is assigned for their removal just at that particular time. He does not show that he has provided, or that he has the ability to provide, any means for their support. Nor does he show, or pretend to show, that the person with whom he left them is under the least obligation to furnish them the means of existence, or to afford them protection for a single day. He well knew at the time he took them away that they were claimed by the relators as well as by himself; that the rights of both were being considered by this court; and he may have seen, when he heard the argument in February, that his title to hold them from the relators could not be maintained. To carry them out of the country under the circumstances, just at that time, without waiting for the judgment, was a gross breach of his duty, as their guardian, and a contempt of the power and authority of this court. The writ of *certiorari* stayed all the proceedings." (*People ex rel. Brooklyn School agt. Kearney*, 21 Howard Practice, 74, 77.)

In a case decided by the Supreme Court of the State of Kansas the facts were that the city of Pittsburg, Kansas, had been ousted by the judgment of the Supreme Court from the exercise of unwarranted power in receiving license fees under the guise of fines for permitting sales of intoxicating liquors. After the judgment had been rendered, a number of saloonkeepers raised a fund from which they paid the salaries of certain of the city's officers and employés. The effect of this conduct was to render the decision of the court nugatory, and to do by indirection and evasion the thing which the judgment of the court had ousted the city from doing. For their contemptuous conduct in attempting to nullify and defeat the judgment of the court, all the parties contributing to the fund and all of the persons receiving any portion thereof in the way of salaries were adjudged to be guilty of contempt of court; and in rendering its decision the court cites and relies upon the authority of *United States v. Shipp*, 203 U. S. 563; *In re Reese*, 47 C. C. A. 87, 90; *Garrigan v. United States*, 89 C. C. A. 494. We quote from the decision of the Supreme Court of Kansas:

"Whether or not all who participated in these efforts are to be regarded as having violated an injunction directed against them, they are guilty of contempt of court in virtue of their having attempted by artifice and evasion to render the judgment nugatory, an act

as plainly contemptuous toward the court as an interference with its process would be. (9 Cyc. 20; *United States v. Shipp*, 203 U. S. 563.)

" 'It is entirely consonant with reason, and necessary to maintain the dignity, usefulness and respect of a court, that any person, whether a party to a suit or not, having knowledge that a court of competent jurisdiction has ordered certain persons to do or to abstain from doing certain acts, cannot intentionally interfere to thwart the purposes of the court in making such order. Such an act, independent of its effect upon the rights of the suitors in the case, is a flagrant disrespect to the court which issues it, and an unwarrantable interference with and obstruction to the orderly and effective administration of justice, and as such is and ought to be treated as a contempt of the court which issued the order.' (*In re Reese*, 47 C. C. A. 87, 90.)

"This proposition was thus applied in *Garrigan v. United States*, 89 C. C. A. 494:

" 'As it is neither charged nor proven that the plaintiff in error was one of the parties enjoined, he is not chargeable for breach or violation of the injunction, in the well-recognized sense of those terms applicable to parties. He was bound, alike with other members of the public, to observe its restrictions when known, to the extent that he must not aid or abet its violation by others, nor set the known command of the court at defiance by interference with or obstruction of the administration of justice; and the power of the court to proceed against one so offending and punish for contemptuous conduct is inherent and indisputable.' "

The State v. Pittsburg, 80 Kan. 710, 712.

The extent and weight of the decision of this court in the Shipp case as an authority to support the proposition that it is a contempt of court to destroy the person or property which is the subject of the litigation, depends upon whether the judgment and decision in that case are to be regarded as based upon a wrongful act of the contemnors in violating and disobeying an order of the court, or upon the acts of the contemnors in setting at naught the authority of the court by refusing to abide the decision that might be rendered by it, and by preventing the exercise of the court's power to hear and determine the matter in litigation.

As we understand it, six persons were adjudged to be guilty of contempt of the court in the doing of the wrongful acts complained of in that case. Two of such persons were officers having the custody and control of the petitioner, whose case was pending before the court. Four of the contemnors were members of the mob, with no relation to any of the proceedings as officers. As we read and understand the opinion in the Shipp case, the conclusion is based not solely upon the view that the contemnors acted in defiance of a known order of the court, but that it is based rather upon the broader proposition, which is amply sustained by authorities, that to destroy the subject of the litigation is a contempt of the court in which the

litigation is pending. We think this view is sustained by the last paragraph of the decision, which we quote:

"The question was touched, in argument, whether the acts charged constitute a contempt. We are of opinion that they do, and that their character does not depend upon a nice inquiry whether, after the order made by this court, the sheriff was to be regarded as bailee of the United States or still held the prisoner in the name of the State alone. Either way, the order suspended further proceedings by the State against the prisoner and required that he should be forthcoming to abide the further order of this court. It may be found that what created the mob and led to the crime was the unwillingness of its members to submit to the delay required for the trial of the appeal. From that to the intent to prevent that delay and the hearing of the appeal is a short step. If that step is taken the contempt is proved." (*United States v. Shipp*, 203 U. S. 563, 575.)

In the case at bar the respondents destroyed the property, which was the subject of litigation at a time when the case was still pending here upon appeal, after a motion to advance had been presented, heard, and decided, but before the mandate of this court had issued to the Circuit Court, and before the time under the rules for the issuing of a mandate to the Circuit Court, and before the time had expired within which the appellant might, under the rules, present its petition for a rehearing. Excepting only that human life is more

sacred than the rights of property, the conduct of respondents in this case, in destroying the property which was the subject of the litigation in the pending suit, is as contemptuous of the authority and dignity of the court as was the conduct of the contemnors in the case of *United States v. Shipp, supra.*

A DISCLAIMER OR DENIAL OF AN INTENTION TO BE IN CONTEMPT OF COURT OR TO VIOLATE THE COURT'S ORDERS, DOES NOT PURGE THE ACCUSED PARTIES OF THE CONTEMPT.

The respondents in their answer in general terms disclaim intent to do anything in violation of or in opposition to the order of the Circuit Court, or of any order of this court; and further answer that what was done by them was with the firm belief that the order had been nullified, set aside, and the injunction dissolved.

In connection with this disclaimer of intent to be in contempt of court, the language of respondents' answer on page 18 should be borne in mind. It is there alleged that on the 14th day of November, 1910, they were advised of the decision of this court, and took counsel of their attorneys, and directed their attorneys to bring a suit in the Supreme Court of the State of Kansas to oust the Clay Center Light and Power Company from

exercising rights claimed by it under the franchise in question, and also instructed their attorneys to make the appellant, the Merrimack River Savings Bank, a defendant in that action. Prior to that time it is claimed they had been advised that it was the judgment of their attorneys that the injunction was void and of no force or effect, but that it was better to await the action of the court in respect to it. It would appear that the knowledge and counsel which the respondents had through their attorneys, instead of being an encouragement to them to destroy appellant's property, was in fact a warning that they should abide the judgment of the courts, and particularly so in view of the fact that their attorneys were instructed to maintain an action in the Supreme Court of the State in the nature of *quo warranto* to oust the appellant and the Clay Center Light and Power Company from exercising rights claimed by them under the franchise. In this connection respondents attempt to justify by saying that a transfer, which was believed to be a sham transfer had been made of the title from the Clay Center Light and Power Company to F. L. Williamson; and that they believed that such sale was made for the purpose of enabling the claimants to the property to maintain a suit in the Circuit Court of the United States. Appellant disclaims that any sham sale or

transfer of the property was made by any of the parties interested in the litigation, but at the same time says that the allegations of the answer of respondents in that respect ought not to avail them as a defense, for these reasons: If a transfer which was in fact a sham transfer had been made, it could not in any respect whatever affect the rights of the city or of the respondents, and if the transfer were, as it was in fact, a *bona fide* transfer and the result thereof should give jurisdiction to the Circuit Court of the United States, so as to enable litigation to be maintained, no harm thereby could come to the respondents, or to the city, and the respondents ought not to be heard to say that their act was done for the purpose of preventing the possibility of such litigation. We invite the attention of the court to a consideration of authorities bearing upon the effect of a disclaimer of intent to violate the court's orders or to be in contempt of court:

"As regards the question, whether a contempt has or has not been committed, it does not depend on the intention of the party, but upon the act he has done. It is a conclusion of law from the act; disobedience to the legitimate authority of the court is, by law, a contempt, unless the party can show sufficient cause to excuse it." (*Wartman v. Wartman*, 29 Fed. Cases, 303, No. 17,210.)

"Nor is the contempt purged by an avowal that no contempt was intended. The question of contempt does

not depend on intention, although, where the contempt was intended, this is an aggravating feature, which goes to the gravamen of the offense.

"Where a receiver had unlawfully appropriated money of the receivership, and was ordered to restore it, and in his answer stated that he had no intention to do wrong, but, by reason of poverty, was unable to make restitution, and was thereupon committed for contempt, it was held, *inter alia*, that a disclaimer of intention does not purge the contempt, nor does a restitution in such case; that the commitment was not alone to compel restitution, but to punish for the offense. (*Cartwright's Case*, 114 Mass. 230; and to the same effect as to intention is the opinion in *Sturoc's Case*, 48 N. H. 428; *The People v. Wilson*, 64 Ill. 194.)"

Hughes v. The People, 5 Colo. 436, 453.

In a Michigan case an injunction order restrained the foreclosure of certain chattel mortgages. On the refusal of the court to dissolve the injunction the mortgages were assigned to a stranger to the chancery record, and a sale of the mortgaged property was then made in violation of the injunction. The parties were adjudged guilty of contempt of court, and from the syllabus of the case we quote the following language:

"*Held*, on appeal, that they cannot be heard to claim that the assignment of the mortgage was formal, and for a special purpose, and void; that the court, having jurisdiction of the subject-matter, and of the parties who held the legal title to the property, had the right to grant the injunction, which defendants and their

solicitor were bound to obey, and which they disobeyed at their peril. That neither their belief, motive, nor the intent with which the writ was disobeyed, in any manner varies their responsibility, but on the contrary they are liable for such violation, in whatever capacity, or from whatever motive they acted." (*Wilcox Silver Plate Co. v. Schimmel*, 59 Mich. 524.)

"Where a fair interpretation of the language used by an attorney in open court shows that he was guilty of contempt, a disclaimer of any intentional disrespect is no excuse." (*Dodge v. State*, 39 N. E. [Ind.] 745.)

"When the contempt consists in a failure to comply with or the disobedience of an order, injunctional or otherwise, resulting in loss or damage to the adverse party, it neither purges the contempt nor repairs the wrong done for the contemnor to avow or to show that he acted from *bona fide* motives and with no intention of being guilty of a contempt. In such case the question of contempt *vel non* is purely a question of law." (7 Am. & Eng. Encyc. of Law, 76.)

"Here ignorance of the law is the principal ground relied upon to discharge the rule, although in connection therewith, the clerk expressly disavows on oath, any 'design to show contempt to the court or its authorities,' notwithstanding the maxim *Ignorantia legis non excusat*, which applies as forcibly to acts done or omitted, which amount in legal contemplation to a contempt of the process and authority of the court, as to acts committed or omitted in violation of the criminal or civil laws of the land. It cannot, in either case, amount to a defense or justification." (*The State v. Simmons*, 1 Ark. 265.)

"We do not feel the force of the argument on the part of the counsel that a mere disclaimer of all intention of contempt, where it is of a constructive kind, so completely purges it as concludes all further proceeding. The authorities do not sustain the proposition to the extent stated. Such a rule would make the court powerless to punish even a gross contempt on the mere disclaimer of all intention. While the intention is often the criterion by which criminal acts are judged, the absence of it in the perpetration of wrong does not always discharge one from the consequences which may follow. In High on Injunctions, section 849, it is said: 'Nor does the question of the motive, or intent with which the writ was disobeyed, alter or vary the responsibility for the violation.'" (*Watson v. Citizens' Savings Bank*, 5 S. Car. 159, 182.)

We are aware that a somewhat different rule prevails in the State of North Carolina. We understand that the courts of that State are singular in the effect given by them to a denial of an intention made by a respondent in contempt proceedings. Upon that subject we quote as follows:

"The intent of the party is given the most controlling effect in North Carolina, where the rule of the common law seems to be carried to its extreme limit." (Rapalje on Contempt, § 121.)

In their answer filed herein respondents state that they, "acting in their official capacity as Mayor and "Council, and not as individuals, did, on the 16th day

"of November, 1910, instruct David Tolles, City "Marshal of the city of Clay Center, to get a sufficient "number of men to assist him and to proceed to re- "move from the streets of said city a sufficient number "of poles and a sufficient amount of wire from the "streets to put said company and said plant out of "business, and to make it so that said plant could not "be operated in said city without a franchise in vio- "lation of law."

There is nowhere a disclaimer of an intention to do the thing which was done by respondents. Their purpose declared by them was to put the plant out of business, and to make it so that it could not be operated in the city. It seems to us that there could not be a stronger declaration of a purpose on the part of the respondents to destroy the property which was the subject of the litigation. The acts of respondents in doing the things complained of were done at a time when this suit was pending here, and also at a time when by their sworn answer they had so far recognized the contention of appellant in respect to the property and franchise as to make it a subject of an ouster suit in the Supreme Court of the State of Kansas, which suit respondents had instructed their attorneys to bring. The right of a citizen to the protection of property from destruction by violence should be, and is,

zealously guarded by the courts, and when property is wantonly destroyed while it is a subject of litigation pending in good faith in the courts, the wrongdoers deserve and should receive punishment that will have a salutary effect to teach litigants to maintain always a proper respect for the authority, power and dignity of the courts.

THE POWER OF THE SUPREME COURT TO PUNISH FOR CONTEMPT IS NOT LIMITED OR RESTRICTED BY STATUTORY PROVISIONS.

It is suggested in the brief of respondents that the powers of this court to punish for contempt may be regarded as limited and restricted by statutory provisions. We doubt if it is necessary to cite authorities in opposition to this view, but we present a few of them in order that authorities may be available if the question is in any sense regarded as open for consideration. We cite the following text from Thomas on Constructive Contempt, and we include the authorities there cited:

"The law is well settled, both in England and America, that the Legislature has no power to take away, abridge, impair, limit, or regulate the power of courts of record to punish for contempts. Rapalje on Contempts, § 11; 7 Am. & Eng. Enc. of Law, (2nd

Ed.,) p. 33; *Arnold v. Commonwealth*, 80 Ky. 300, 44 Am. Rep. 480; *Middlebrook v. State*, 43 Conn. 257, 21 Am. Rep. 650; *State v. Morrill*, 16 Ark. 384; *People v. Wilson*, 64 Ill. 195, 16 Am. Rep. 528; *Ex parte Robinson*, 19 Wall. 505, 22 L. Ed. 205; *Worland v. State*, 82 Ind. 49; *Cheadle v. State*, 110 Ind. 301, 11 N. E. 426; *Holman v. State*, 105 Ind. 513, 5 N. E. 556; *Matter of Shortridge*, 99 Cal. 526, 34 Pac. 227, 21 L. R. A. 755, 37 Am. St. Rep. 78; *People v. Stapleton*, 18 Colo. 568, 33 Pac. 167, 23 L. R. A. 787; *In re Chadwick*, 67 N. W. (Mich.) 1071; *Hawes v. State*, 46 Neb. 150, 64 N. W. 699; *Hale v. State*, 55 Ohio St. 210, 45 N. E. 199, 36 L. R. A. 254, 60 Am. St. Rep. 691. In *Wyatt v. People*, 17 Colo. 261, 28 Pac. 964, the court said: 'Though the legislature cannot take away from the courts created by the constitution the power to punish contempts, reasonable regulations by that body touching the exercise of this power will be regarded.' " (The Law of Constructive Contempt, Thomas, pp. 210, 211.)

From the same book, page 212, we quote:

"It is worthy of observation that in only the States of Georgia and Louisiana is power given by the Constitution of the State to the Legislature to limit the power of the court to punish for contempt. In all the other States the better opinion is that, where the court is a creature of the constitution, the inherent power to punish contempt cannot be shorn, abridged, limited, or regulated. This is the only logical view to take, because by Const., art. 3, the powers of government are distributed between the legislative, executive, and judicial departments, and it is further expressly pro-

vided that 'no person, or collection of persons, charged with the exercise of powers properly belonging to one of these departments, shall exercise any power properly belonging to either of the others, except in the instances in this Constitution expressly directed or permitted.'" (The Law of Constructive Contempt, p. 212, Thomas.)

"Every constitutional court of general common-law jurisdiction has the inherent power to punish for contempt, and cannot be shorn of that power by statute." (*State v. Bland*, 189 Mo. 197; *Smith v. Speed*, [Okla.] 55 L. R. A. 402.)

We refrain from further citations of authorities upon this subject, although they are abundant, for the reason that respondents do not, as we think, *seriously contend* that the power of this court to punish for contempt is limited or restricted by statute.

THE MERITS OF THE ORIGINAL ACTION IN RESPECT TO WHETHER THE MORTGAGE HELD BY THE APPELLANT IS IN FACT A LIEN UPON THE PROPERTY DESTROYED, IS NOT EXAMINABLE IN THIS PROCEEDING.

An effort is made in the answer by respondents to make it appear that the property destroyed was not in fact included within the mortgage lien of the appellant, the Merrimack River Savings Bank. If the subject is examinable, we invite an examination of the

record, which will show that the mortgage relied upon included the property in controversy by a description in form only different from the one mentioned on page 23 of the answer. We consider, however, that this question is not examinable here, for the reason that it involves the merits of the original action as inquired into by the Circuit Court in granting the temporary injunction, and also in granting a continuance of the injunctional order after the temporary injunction was dissolved, and in addition to this the demurrer to the bill filed by appellant in the Circuit Court is an admission of the existence of the mortgage lien.

On the subject of whether the questions thus involved are examinable here, we cite the following authorities:

"It is in keeping with the strict pursuance of the proceedings that no collateral questions, or questions involving the merits or the justice of the cause in which the offense arises, are examinable at the hearing." (4 Encyc. of Pl. & Pr. 771.)

"It is the well-established rule in procedure for contempt for a disobedience of an injunction order that the defendant, when cited to appear, cannot purge himself of the contempt by going into the merits of the case to determine whether or not the discretion of the court was properly exercised in granting a temporary restraining order, or whether or not on final hearing the injunction should be dissolved. It is his duty to observe and obey the order implicitly as long as it

stands unrevoked; and if he is of opinion, or has been advised by his counsel, that the order was improvidently issued, it is his duty to apply to the court for a modification or construction of its provisions, as it would lead not only to confusion and uncertainty, but would be destructive of the very purpose of a temporary restraining order if the party against whom the injunction had been issued should be allowed to judge of the propriety or the necessity of the relief sought. *Rodgers v. Pitt et al.*, (C. C.) 89 Fed. 424, 428, 429; 1 Beach on Injunctions, par. 250; 2 High on Injunctions, § 1427. In *State ex rel. Carroll v. Campbell, et al.*, 25 Mo. App. loc. cit. 639, Lewis, P. J., said:

" 'The return avers that, on the face of the record, it appears that the case is not one in which an injunction should ever have issued, and that the relator was never entitled to an injunction on the facts stated. If this proposition were true, it would be wholly irrelevant and immaterial to the matter in hand. That an injunction was, in fact, granted by a competent authority, held to be such under the laws of this State, is sufficient to render the defendants liable as for a contempt, if they have willfully disobeyed it, as the information charges.'

"The rule is thus expressed in 10 Amer. & Eng. Enc. of Pleading & Practice, p. 1105:

" 'It is well settled, and the books are full of cases holding that a defendant who has disobeyed an injunction can not justify his disobedience by showing that the injunction was improvidently or erroneously granted or irregularly served; and that if the injunction has been improperly allowed the only remedy is by a motion to vacate or dissolve it.'

"In *United States v. Agler* (C. C.), 62 Fed. 824, Baker, J., said:

" 'There is not an authority, in the judgment of the court, that can be found in the books, certainly the court is aware of none, in which it has ever been held that a man who was enjoined and had violated the injunction could escape punishment by alleging that, at the time the writ of injunction was issued, the bill was demurrable.' "

Blake v. Nesbet, 144 Fed. 279, 284.

In the foregoing brief and argument we have endeavored to afford the court the best assistance possible in the limited time at our disposal in arriving at a proper solution of the questions raised by the respondents in their motion and brief. We beg to express our willingness and desire to proceed further in this matter as to the court may seem proper, to the end that complete justice may be done in the premises.

C. C. COLEMAN,
D. R. HITE,
F. L. WILLIAMS, AND
MULVANE & GAULT,
Solicitors for Petitioner.

JANUARY, 1911.

In the Supreme Court
of the United States.

MERRIMACK RIVER SAVINGS BANK,
Appellant,

vs.

THE CITY OF CLAY CENTER, KANSAS, A MUNICIPAL CORPORATION, GEO. W. HANNA, MAYOR OF SAID CITY, O. L. SLADE, G. P. RANDALL, W. D. VINCENT, L. BRIGHTWESER, E. D. HARTWELL, AND S. D. TRIPP, COMPOSING THE CITY COUNCIL OF SAID CITY, AND THE CLAY CENTER LIGHT & POWER COMPANY, A CORPORATION,
Appellees.

No. 604
October
Term
1910

MOTION TO DISCHARGE RULE.

Comes now, Geo. W. Hanna, O. L. Slade, W. D. Vincent, S. D. Tripp and Geo. P. Randall, appellees above named on this third day of Jan-

uary 1911, the same being the time fixed by the court for them to show cause why an attachment should not issue against them respectively for contempt of this court under its rule for said purpose issued on the 12th day of December 1910, and moves the court to discharge said rule to show cause for the following reasons, to-wit:

First: The petition for the rule to show cause filed by the Savings Bank shows on its face that the injunction which is alleged to have been violated and the order keeping the same alive, which is alleged to have been violated is an order of the Circuit Court for the District of the State of Kansas and not an order of this Court.

Second: Because the petition for the rule to show cause fails to show in any way a violation on on the part of the appellees of any injunction, rule, order or mandate of any kind or character of this court.

Third: That the original bill filed in the Circuit Court for the District of Kansas, the amended bill and the Second amended bill filed in said Circuit Court each showed upon its face that the Circuit Court, for the District of Kansas, had no jurisdiction of either of the persons or the subject-matter involved in said suit and therefore said court was without jurisdiction to issue any order of injunction either temporary or perpetual: that being without jurisdiction to issue the temporary injunction, it was also without jurisdiction or power to keep said temporary injunction alive or to make any order concerning same; that the Circuit Court for the District of Kansas being totally

without jurisdiction, that this court would be without jurisdiction of either party or subject matter, and being without jurisdiction it would have no right or authority to punish parties for violation of any such order for the reason that the same would be void.

F. B. DAWES
and
R. C. MILLER,
Attorneys and Solicitors for said Appellees.

In the Supreme Court

Of the United States.

Merrimack River Savings Bank,

Appellant,

vs.

The City of Clay Center, Kansas, a municipal Corporation, Geo. W. Hanna, Mayor of said City, O. L. Slade, G. P. Randall, W. D. Vincent, L. Brightweser, E. D. Hartwell, and S. D. Tripp, composing the City Council of said City, and the Clay Center Light & Power Company, a Corporation,

Appellees.

No. 604
October
Term
1910

SHOWING BY APPELLEES WHY AN ATTACHMENT SHOULD NOT ISSUE AND WHY THEY SHOULD NOT BE PUNISHED FOR CONTEMPT IN THE ABOVE ENTITLED ACTION.

Come now the above named appellees, Geo. W. Hanna, Mayor of the City of Clay Center, O.

L. Slade, W. D. Vincent, S. D. Tripp, and Geo. P. Randall, members of the council of the City of Clay Center in obedience to the command of this court by its rule issued on the 12th day of December, 1910, and as a reason why an attachment for contempt should not be issued against them or either of them shows to the court as follows:

First: The petition for the rule to show cause filed by the Savings Bank shows on its face that the injunction which is alleged to have been violated and the order keeping the same alive, which is alleged to have been violated is an order of the Circuit Court for the District of the State of Kansas and not an order of this court.

Second: Because the petition for the rule to show cause fails to show in any way a violation on the part of the appellees of any injunction, rule, order or mandate of any kind or character of this court.

Third: That the original bill filed in the Circuit Court for the District of Kansas, the amended bill and the second amended bill filed in said Circuit Court each showed upon its face that the Circuit Court, for the District of Kansas, had no jurisdiction of either the person or of the subject matter involved in said suit and therefore said court was without jurisdiction to issue any order of injunction either temporary or perpetual. That being without jurisdiction to issue the temporary injunction, it was also without jurisdiction or power to keep said temporary injunction alive or to make any order concerning same; that the Circuit Court for the District of Kansas being totally with-

out jurisdiction, that this court would be without jurisdiction of either party or subject matter, and being without jurisdiction it would have no right or authority to punish parties for the violation of any such order for the reason that the same would be void.

Fourth: Appellees further show that on the 22nd day of April, 1886 the City of Clay Center was a City of the second class, duly organized under the laws of the State of Kansas. That on said date the Mayor and Council of said City duly passed an ordinance which was afterwards duly published and become affective by which said ordinance the City of Clay Center granted to one A. F. Dexter, a franchise or privilege to use the streets, alleys and public grounds of said city for the purpose of planting poles and stringing wires for the purpose of distributing electricity to furnish light and power for said City and its inhabitants. That said ordinance was passed under and in pursuance of power granted to it by the Legislature of the State of Kansas, by Section 7 of Chapter 99 of the Session Laws of Kansas of 1885.

Said section so far as applies to the matter in hand at this time reads as follows:

"The Council may provide for, and regulate the lighting of the streets and the erection of lamp posts and the numbering of the buildings in the city and the construction of sewers; and the council shall have power to make contracts with any person, company or association for such purpose and give such person, company or association the privilege of furnishing light for the streets, lanes or alleys of said city for any length of time not exceeding twenty-one years."

By virtue of the above law of the State of Kansas and more than one year after the same had been passed by the Legislature of the State of Kansas, the ordinance above named granting to said Dexter his franchise was passed by the council of said City. Section 9 of said ordinance was and is in the words and figures following:

"Section 9. That the right and privileges hereby granted are for a term of twenty-one years; provided the said Alonzo F. Dexter, his successors and assigns shall begin the erection of said electric light works within ninety days from the passage of this ordinance and shall complete the same and have the same in working order within one year from the passage of this ordinance, and provided further, that if at the expiration of twenty-one years the city shall refuse to grant a further continuance of these privileges the said City shall purchase said works at their appraised value, the same to be appraised by three disinterested electors of the state of Kansas, one of whom shall be chosen by the city, one by Alonzo F. Dexter, his successors and assigns, and the two so chosen shall select a third, and the amount agreed upon, upon their oaths, by the three so chosen shall be the price to be paid therefor.

And provided further, that the City of Clay Center shall have the right to revoke the privileges herein granted at any time if the said Alonzo F. Dexter, his successors and assigns shall fail to comply with all the provisions of this ordinance.

That said franchise by its terms was granted for a term of twenty-one years, and that it expired on the 22nd day of April, 1907. That the said Dexter proceeded to erect an electric light plant

under his said franchise. That afterwards, all his interest in the plant and franchise was sold to one William Williamson, who in turn conveyed the same to F. L. Williamson and Company, who in turn conveyed the same to the Clay Center Light & Power Company, who continued to own the plant and franchise until the expiration of the franchise on the 22nd day of April, 1907, and who continued to own the light and power plant until long after this action was brought.

That shortly prior to the expiration of said franchise the Mayor and Council of the City of Clay Center offered to renew the same and introduced an ordinance for that purpose, known as the Rose Substitute, which made the maximum charge for electricity 12½c per kilowat. That immediately after the reading of said proposed ordinance, F. L. Williamson & Co. appeared before the council and notified the council in writing that it was not necessary to consider said ordinance, that they would accept it under no consideration; that it was simply a waste of time for the council to consider it. That thereupon after full and due consideration, the city concluded, after having advice of the city attorney of said city and of other attorneys of experience and long standing at the bar, that section 9 of the ordinance above set out was beyond the powers of the council ultra vires and void concluded and determined not to extend or grant any further franchise to F. L. Williamson & Company, but that the city would build and construct a plant of its own. That under the laws of the state of Kansas it held an election and voted bonds

in the sum of twenty five thousand dollars for the purpose of building and erecting a light and power plant.

That at the time the city voted bonds to build an electric light plant of its own, C. C. Coleman, one of the attorneys of the Clay Center Light & Power Company and now one of the solicitors for the Merrimack River Savings Bank, happened to be Attorney General of the State of Kansas.

That said C. C. Coleman who was as aforesaid Attorney General and at the same time one of the attorneys of the Clay Center Light & Power Company, brought an action in the name of the State of Kansas ex rel, C. C. Coleman, Attorney General, vs. the City of Clay Center, to enjoin the uttering and issuing of the bonds so voted by the city. That said action was brought for the benefit of and at the special instance and request of the Clay Center Light & Power Company, its agents and officers, for the purpose of harassing and hindering the city in building its electric light plant. That said suit was filed in the District Court of Clay County, Kansas, and a temporary injunction was issued by the Judge of said Court restraining the uttering of said bonds pending such litigation. That the District Court of Clay County, Kansas, upon final hearing of said suit, found in favor of the said city. That thereupon the said C. C. Coleman, Attorney General as aforesaid, caused an appeal to be taken to the Supreme Court of Kansas and secured an order of the District Court keeping the temporary injunction alive

pending the appeal. That when said case was filed in the Supreme Court an order was obtained from the Supreme Court keeping said injunction alive, pending the hearing in the Supreme Court. That afterwards the Supreme Court affirmed the decision of the Court below and said injunction was dissolved. That said action was brought in the interest of the Clay Center Light & Power Company and for the purpose of harassing the city and to delay the sale of its bonds and the erection of its plant. That because of said suit the city was enjoined from disposing of its bonds for a period of more than eleven months.

That on the 16th day of April, 1907, six days before the expiration of the franchise under which the said F. L. Williamson & Company operated its plant upon the streets of the City of Clay Center, the said City served notice upon F. L. Williamson & Campany and the Clay Center Light & Power Company to remove the poles and wires from the streets of the City of Clay Center on or before the first day of May, 1907, as the same interfered with the building of the city's plant and the planting of its poles and stringing wires thereon, and that unless they, as the owners there of, removed the same in puruance of said notice the city would proceed to do so.

That prior to the first day of May, the time fixed for the removal of said poles and wires and on April 29th, 1907 the Clay Center Light & Power Company brought an action in the District Court of Clay County, Kansas to specifically enforce the alleged contract it claimed to have with

the city by virtue of Section 9 of the Dexter Ordinance hereinbefore set out. That upon the filing of said suit, the District Court enjoined the city and the members of the council from removing the poles and wires of said company from the streets of the city until the final hearing of said action.

The said action came on for hearing in the District Court of Clay County, Kansas, on the 24th day of June, 1907. The District Court found in favor of the Light & Power Company and adjudged that said Section 9 bound the city to purchase said plant, it having failed to renew said franchise, and ordered appraisors to be named as provided in said orinance, and rendered judgment against the city for cost. That an appeal was taken from the District Court of Clay County, Kansas, to the Supreme Court of the State of Kansas. That said action in the Supreme Court came on for hearing in its order and that on the sixth day of June, 1908, the Supreme Court reversed the judgment of the District Court of Clay County, Kansas, and held that said Section 9 of said ordinance hereinbefore set out was beyond the power of the council ultra-vires and void. That under the laws of the state Kansas, the city had power only to grant a franchise for a term of twenty-one years and that anything in said ordinance in addition thereto was ultra vires and void. That said Light & Power Company filed a petition for rehearing in the Supreme Court of the State of Kansas which was denied by said Court on the 10th day of October, 1908. That the decision of the Supreme Court was and is in the words and figures following, to-wit:

"Many important and interesting questions have been ably and exhaustively discussed by council both in the briefs and oral argument, but we have concluded that the case can be disposed of by the decision of a single question, and will, therefore, consider nothing further. It will be seen that the statute which conferred authority upon which this franchise was granted expressely limits the duration of such a grant to 21 years. It is needless therefore, to inquire what power the city might have had with respect to providing electric lights for its streets, lanes and alleys, and for the use of its inhabitants, under the general welfare clause of its charter, in the absence of a statute upon that subject, nor what rights it might have had under the general welfare clause and this statute taken together, if the restrictive clause had been omitted. The limitation against granting such a franchise for a period not exceeding 21 years amounts to an absolute prohibition, which is conclusive upon the city and all other persons. Both of the parties to this franchise were bound to take notice of the law under which they acted, and must be held to have contracted with reference thereto. The city council, when the ordinance in question was enacted, being without authority to grant the franchise for a period exceeding twenty-one years, was likewise, powerless to impose a valid burden upon the city for refusing tc do the act which the statute prohibited it from agreeing to do. That which the city was forbidden to do directly it could not accomplish by evasion and indirection. The evident purpose of the limitation placed upon the continuance of franchises of this kind was to give cities at reasonable intervals an opportunity to revise the provisions thereof, and thereby secure by the terms of a new contract such advantages as might result from the growth of the city and the consequent increased appliances for lighting plants and otherwise. The language here

used is: 'If at the expiration of twenty-one years the city shall refuse to grant a further continuance of these privileges the city shall purchase,' etc. This completely deprives the city of an opportunity to stipulate for any change in the terms or conditions of the contract and enforces a perpetuation of the old franchise, however disadvantageous its provisions might be to the city. In this indirect manner the object of the statute was rendered nugatory. This provision of the statute presents a complete bar to the enforcement of this provision of the contract. These propositions are too familiar and elementary to justify the citation of authorities in their support.

The judgment of the district court is reversed with instructions to enter judgment for costs in favor of the city." 78 K. 390.

That after the decision of the Supreme Court of Kansas the Clay Center Light & Power Company presented to the Honorable D. J. Brewer, one of the Justices of this Court, an application for a writ of error to the Supreme Court of the State of Kansas, which said writ was by said Justice allowed, and the record, or rather a transcript thereof, was duly filed in this court and a bond duly given to keep the injunction granted by the state court alive during the pendency of the proceedings in this court. That said writ of error on motion of the City of Clay Center was by this court dismissed in Janury, 1909 for the want of jurisdiction, there having been no attempt in any of the pleadings in the state court to raise any federal question. That in Fedruary, 1909, before the order of this court dismissing the case could reach the Supreme Court of the State of Kansas, and before the mandate of the Supreme Court of the State of Kansas

could be entered on the journal of the District Court of the State of Kansas and said injunction dissolved by order of the supreme court, this action was commenced and a restraining order issued while the injunction of the district court of the State of Kansas was still in force. That the original bill filed in this case grounded jurisdiction of the circuit court on diversity of citizenship alone. To this bill the City of Clay Center filed its demurrer, pointing out that according to the allegations of the bill, the Light & Power Company, who stood in the shoes of the mortgagor and the alleged mortgagee, the plaintiff in this action, should be aligned on one side of the controversy, and the City of Clay Center on the other side. That when such alignment was made, it appeared from the face of the bill that the City of Clay Center, a citizen of the State of Kansas, was on one side of the controversy, and the Light & Power Company, a citizen of Kansas, on the other side, and that therefore, the Federal Court had no jurisdiction.

That on the day set for the argument of said demurrer the said Merrimack River Savings Bank asked leave to amend its bill. That afterwards it filed an amended bill in which it attempted to set out that the suit was one arising under the Constitution and Laws of the United States. To this amended bill the city demurred because it showed on its face that the suit did not arise under the Constitution or Laws of the United States. After argument and consideration of extensive briefs filed by both parties, the court sustained the de-

murrer and ordered that unless an amended bill was filed before the next rule day that the bill and amended bill be dismissed for want of jurisdiction. That prior to the next rule day of the court the plaintiffs in this action filed the second amended bill and made a further attempt to show that the suit was one arising under the Constitution and Laws of the United States. To this Second Amended bill the city, its mayor and council demurred for the reason that it too showed upon its face that the suit was not one arising under the Constitution or Laws of the United States. This demurer was heard upon argument and briefs submitted, and the Circuit Court sustained said demurrer for the want of jurisdiction and dismissed the original bill, amended bill, and second amended bill.

That immediately upon the sustaining of said demurrer and the dismissal of the bills of complaint the plaintiff, the Merrimac River Savings Bank, filed its petition in the Circuit Court of the United States praying that an appeal be allowed to this court. That on hearing of said petition the Circuit Court allowed the appeal and made the order extending and keeping alive the temporary injunction theretofore issued by the court pending the appeal as set out in the petition of the plaintiff for a rule to show cause.

That soon thereafter a transcript of the record in the case in the Circuit Court was filed in this court. That afterwards on the 17 day of October, 1910, due notice having been given and service of brief having been made as provided by rule 6 of

this court the City of Clay Center and its mayor and council filed its motion to advance the case under rule 32 of this court which motion was duly submitted on briefs of both parties on the 17 day of October, 1910. The motion to advance was granted by this court and the merits of the appeal submitted on briefs by both parties.

That on the 24th day of October, 1910, after full and due consideration this court made an order dismissing said appeal for the reason that the original bill, amended bill and second amended bill filed by plaintiff in the court below showed upon their faces that the federal court had no jurisdiction of the subject matter of the suit.

That when the temporary injunction was first granted by the Circuit Court of the United States these appellees sought the advice and counsel of F. B. Dawes and R. C. Miller, the attorneys regularly employed by the city to appear for them and the city in this litigation and after careful investigation made by said attorneys said attorneys infotmed these appellees and the Mayor and Council of the City of Clay Center when in regular session that in their judgment the Circuit Court of the United States had no jurisdiction of the subject-matter involved in the suit and no power, authority or jurisdiction to grant an order of injunction in said action. That said injunction in their judgment was absolutely void and of no force or effect whatever. Said attorneys, however, at the time advised the Mayor and Council that it was better, to await the action of the court and acting upon the advice of said attorneys

they concluded to abide the action of the court and refrain from removing the nuisance from the street until after the same had been adjudicated by the courts and the injunction dissolved by order of the court, notwithstanding the fact that during all of the time they have been waiting for a decision of the court each and every one of them firmly believed that the injunction was absolutely void for want of jurisdiction in the court to make the order. That on or the 14th day of November, 1910, these appellees ascertained that this court had dismissed the appeal of plaintiff on the grounds that the court issuing the injunction had no jurisdiction of the subject-matter of the suit. That thereupon they again consulted with their attorney and while fully beleving that the suit was ended and that the injunction had been dissolved by order of the court and its decision affirmed by this court, they, as the Mayor and Council of this city, instructed their attorneys to bring a suit in the Supreme Court of the State of Kansas in *quo warranto* to oust the Clay Center Light & Power Company from exercising the franchise and privilege of occupying the streets, alleys and public grounds of the city with its poles and wires and to oust it from operating its electric light plant in the city of Clay Center, Kansas. They instructed said attorneys to make this plaintiff, the Merrimac River Savings Bank a defendant in said action so that it could be brought into court and have a full hearing of any rights it claimed in the matter. That on the evening of the 15th day of November, 1910, they ascertained that on the early morning of the 15th day of Novem-

ber, 1910, the Clay Center Light & Power Company held a meeting in the night time by which it pretended to sell and convey all its right, title and interest in and to the electric light plant in the city of Clay Center, Kansas, and to its pretended franchise to operate said plant in and upon the streets of Clay Center, Kansas, to one F. L. Williamson who was then and there a resident and citizen of Kansas City in the State of Missouri.

Appellees further show to the court that the said F. L. Williamson together with his brother, A. L. Williamson, were the largest stockholders in the Clay Center Light and Power Company, that the Williamson family owned a majority of the stock in said Clay Center Light & Power Company.

Plaintiffs further show that said pretended sale and transfer was made after this court had dismissed the appeal of plaintiff herein and just a short time before the mandate of this court would be sent down to the court below. Appellees further show that according to their best information and belief that said pretended sale was a mere sham and done for the purpose of having it appear that the plant and said pretended franchise had been conveyed and was then owned solely by F. L. Williamson, a citizen of Kansas City in the State of Missouri and that said sham sale was made for the purpose to enable another suit to be filed by this plaintiff in the Circuit Court of the United States and for the sole purpose of having the ownership of said plant in some one who was not a citizen of the State of Kansas so as to confer juris-

diction on the Circuit Court of the United States on the grounnd of diversity of citizenship alone.

These appellees further show to the court that when they ascertained that this sham sale had been made and firmly believing that it was done for the purpose of bringing another suit of the same nature as this for the purpose of again enjoining the City, its Mayor and Council from removing said poles and wires from the said streets of said City and for the purpose of thus gaining the power to unlawfully trespass upon the streets of the City of Clay Center for another period of one or two years and firmly believing that the litigation was ended and that said injunction had been fully and legally dissolved by the judgment of the Circuit Court and by the judgment of this court and firmly believing that there was at the time no order of any court restraining or prohibiting them from taking action to remove said poles and wires from the streets and abate the nuisance that they, Geo. W. Hanna as Mayor and the other appellees of the City Council and acting in their official capacity as Mayor and Council and not as individuals did on the 16th day of November, 1910, instruct David Tolles, City Marshal of the City of Clay Center, to get a sufficient number of men to assist him and to proceed to remove from the streets of said City a sufficient number of poles and a sufficcient amount of wire from the streets to put said company and said plant out of business and to make it so that said plant could not be operated in said City without a franchise in violation of law.

Appellees further show to the court that if

they had known or believed that the temporary injunction granted by the Circuit Court had not yet been dissolved by the judgment of the Circuit Court and of this Court that no action would have been taken in the matter. That there was no intention on the part of either of these appellees to do anything in violation of or in opposition to the order of the Circuit Court or of any order of this court no matter whether the court had jurisdiction to issue the order or not. That they did the act with the firm belief that said order had been annulled, set aside and the injunction dissolved. That they firmly believed at the time they gave the order as above set out that there was no order of any court existing at the time restraining them from such action.

Appellees further show to the court that the mortgage set out in plaintiff's bill in this action was given by one William Williamson who then owned the plant and franchise to Crippen, Lawrence & Company on the 2nd day of January, 1899. That said mortgage does not cover the electric light plant nor the franchise granted to A. F. Dexter which was afterward purchased by the Clay Center Light & Power Company. That said mortgage covers what is known as the Williamson Milling Plant and Elevator and its mill dam across the Republican river, its flume extending from the dam to the mill and all franchises to overflow lands with water by reason of said dam and in no way did it or does it cover the electric light plant or any pretended franchise granted by the City. That the property covered by said mortgage is of the value of more than One Hundred Thousand Dol-

lars and the mortgage is for the security of only Fifteen Thousand Dollars.

Appellees further show that said mortgage was not given to secure any loan at the time made by Crippen, Lawrence & Company but that there was an old mortgage of said amount given many years before by A. F. Dexter to said Crippen, Lawrence & Company. That after the giving of said mortgage by said A. F. Dexter, one William Williamson became the owner of the mill property and also of the electric light plant. That the old mortgage given by Dexter covered not only the mill property but also the electric light franchise and plant.

That when the said William Williamson became the owner of what was known as the Dexter Mill Plant, the old mortgage thereon for Fifteen Thousand Dollars still existed.

William Williamson who purchased the Dexter Mill Plant erected a large flouring mill thereon and also constructed a new flume and an entirely new dam across the Republican River. The old mortgage and the notes which it secured being past due an arrangement was made between the Merrimac River Savings Bank who then owned the old note and mortgage and William Williamson by the terms of which this plaintiff agreed to extend the time of payment for nineteen years at two per cent per annum provided the said William Williamson would give a new bond or note and a new mortgage on said mill property. That on the second day of January, 1899, the old note was taken up and cancelled and the mortgage set up in plaintiff's bill in this action was executed by

the said William Williamson. That at the time said mortgage was executed the life of the Dexter franchise was only eight years and the bond given at the time was to run nineteen years. That the old mortgage describes identically the same property as that described in the mortgage in plaintiff's bill and in identically the same words. In addition to the property described in the mortgage set out in plaintiff's bill the old mortgage which was taken up and cancelled contained the following:

"Also the Electric Light Plant owned and operated by the said Alonzo F. Dexter in Clay Centre, together with all electric light dynamos used in operating the same with all line wire, lamps and fixtures, globes, carbons, and all machinery and tools, including poles and all other appurtenances and appliances belonging to and used in connection therewith, and all rights and privileges granted said Alonzo F. Dexter by the city of Clay Center, and also the right to use the water power, attached to said Dexter's mill, in running and operating said electric light plant—said dynamos and part of said fixtures being kept in the building known as Dexter's Mill, and the lamps in the mill building and in the stores, residences, churches, and other buildings of said Alonzo F. Dexter's various electric light patrons and suspended in the streets of said city—Hereby granting and assigning to said grantees for the purposes of this conveyance, all the rights, privileges, franchises and advantages, granted to said Alonzo F. Dexter by Ordinance numbered eighty-seven (87) of the city of Clay Centre, entitled "An ordinance relating to the lighting of the streets with electricity" and all other rights, privileges and franchises which may be hereafter granted by said city to the said Alonzo F. Dexter, or his assigns, relating to the said

electric light plant, with the appurtenances, and all the estate, title and interest of the said party of the first part therein."

Appellees show to the court that the above clause which was in the old mortgage which was taken up and cancelled by the giving of the one mentioned in plaintiff's bill of particulars was entirely omitted from the new mortgage and, therefore, appellees allege the fact to be that the mortgage set out in the bill filed by the Merrimack River Savings Bank does not cover the electric light plant and that said Savings bank has no interest of any kind or character in or to the electric light plant referred to in the petition for the rule in this case. Appellees further show to the court that to the best of their knowledge and belief the Merrimack River Savings Bank, when it began the same, knew that it had no interest in the light plant in Clay Center, but it simply permitted the use of its name by the Clay Center Light and Power Company so that said Power Company could bring an action and prevent the city from removing said nuisance from the streets and so that said power company might unlawfully trespass upon the streets of said city pending said litigation. Said appellees having fully answered and shown cause why they should not be punished for contempt,ask thatthe court discharge said rule and that they go hence without day.

GEO. W. HANNA.
O. L. SLADE.
GEO. P. RANDALL.
W. D. VINCENT.
S. D. TRIPP.

STATE OF KANSAS, }
CLAY COUNTY, } ss.

George W. Hanna, W. D. Vincent, O. L. Slade, George P. Randall and S. D. Tripp, appellees above named and who were cited by the Supreme Court of the United States to show cause on the 3rd day of January, 1911, why attachment should not issue for them and why they should not be punished for contempt of the Supreme Court of the United States, each being duly sworn, upon his oath, says:

That all of the matters set out in the above and foregoing statement of cause why he should not be punished for contempt so far as the same relates to his belief and motives for doing the acts charged are concerned are absolutely true and each for himself solemnly swears to the best of his knowledge and belief that all of the facts hereinbefore set forth in said statement are true, both in substance and in fact.

GEO. W. HANNA.
O. L. SLADE.
GEO. P. RANDALL.
W. D. VINCENT.
S. D. TRIPP.

Subscribed and sworn to before me this 27th day of December, 1910.

A. V. CARLSON,
Notary Public.

My commission expires May 3d, 1914.

Office Supreme Court U. S.
FILED
JAN 23 1911
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1910.

MERRIMACK RIVER SAVINGS BANK,
Appellant,
vs.
THE CITY OF CLAY CENTER, KANSAS, a Municipal Corporation, GEO. W. HANNA, Mayor of said City, O. L. SLADE, G. P. RANDALL, W. D. VINCENT, L. BRIGHTWESER, E. D. HARTWELL and S. D. TRIPP, composing the City Council of said City, and the CLAY CENTER LIGHT & POWER COMPANY, a Corporation,
Appellees.
No. 604.

REPLY BRIEF OF APPELLEES IN PROCEEDINGS FOR CONTEMPT.

F. B. DAWES and
R. C. MILLER,
Attorneys and Solicitors for Appellees.

St. Louis Law Printing Co., Printers' Building, 9th & Walnut. Main 1819.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1910.

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THE CITY OF CLAY CENTER, KANSAS, a Municipal Corporation, GEO. W. HANNA, Mayor of said City, O. L. SLADE, G. P. RANDALL, W. D. VINCENT, L. BRIGHTWESER, E. D. HARTWELL and S. D. TRIPP, composing the City Council of said City, and the CLAY CENTER LIGHT & POWER COMPANY, a Corporation,
Appellees.

No. 604.

REPLY BRIEF OF APPELLEES IN PROCEEDINGS FOR CONTEMPT.

We desire a few words in reply to the brief filed herein by appellant. We will not be able to call attention to the page or pages of appellant's brief because up to this day, the 20th of January, 1911, only a manuscript copy of the brief has been served upon us.

This is a proceeding in the nature of a prosecution for a crime committed. The petition for the rule in this case charges the appellees with having wilfully violated an order of the Circuit Court for the District

of Kansas keeping alive a preliminary injunction granted by said court during the pendency of this appeal. A rule was issued on this petition requiring appellees to show cause why an attachment should not issue and they be punished for contempt. This petition, or affidavit for a rule to show cause, under the practice, should be treated as an indictment or information, and the appellees should not be tried for any offense other than the one charged. These appellees are therefore here to answer to the charge of having violated an order of the Circuit Court of the United States while the case in which such order was made was pending in this court.

As a preliminary matter for the Court to pass upon before entering into the merits of the questions raised in the return, appellees have filed a motion to discharge the rule for the reason that on the face of the complaint, petition or information, it is shown that no order of this court has been violated by the appellees, and for the reason that it is shown that the appellees are charged with violating an order of the court from which this appeal was taken.

In our former brief we cited many cases showing that when an appeal is taken, prohibitive injunctional orders of the court below remain in full force and effect and that the court below, after appeal taken still has jurisdiction to enforce its orders and maintain the *status quo* of property rights. The cases cited go to the full extent, not only that the court below retains jurisdiction to punish for contempt a violation of its orders, but that it has the sole jurisdiction to punish such violation.

In our former brief we stated that there were two or three states of the Union in which the courts of last

resort had apparently taken a different view. These decisions of these courts have been gathered together in the brief of appellant and quoted as sustaining the doctrine that when an appeal is taken the appellate court, and it only, has power to punish a violation of an order of the court below pending the appeal. We now desire to review briefly the cases cited in appellant's brief.

First, let us call attention to a statement in the brief as follows:

> "The decisions in several of the cases cited sustain the right of the trial court even after appeal to punish for contempt in violating injunctional orders, but the courts of two states only have held that the jurisdiction so to punish is with the trial court to the exclusion of the appellate court while the appeal is pending. * * * The decisions of West Virginia and Illinois, which are relied upon, must be considered as qualified authority, because of the fact that each of them recognizes a distinction to be drawn between the status of a case appealed from a judgment granting a final injunction and an appeal dissolving and denying an injunction. In the decisions cited and relied upon from West Virginia we find this authority quoted with evident approval. Where there is a dissolution and an appeal and *supersedeas*, State v. Bridge Co., 16 W. Va. 864, holds that such contempt proceedings must be in the appellate court."

Duty to our clients compels us to say that the case from West Virginia lays down no such doctrine. What the case from West Virginia decides is this, where an appeal is taken to the Supreme Court and the Supreme Court **itself** makes an order of *supersedeas*, commanding the parties to maintain the *status quo* pending the appeal, and such **supersedeas order of the Supreme Court is violated** pending the appeal, then

the proceeding must be in the Supreme Court because it was an order of the Supreme Court that was violated or contemned. The Court in giving its reasons why this is so used the following language:

> "But the proper view of this subject is that the *supersedeas* issued up by this operates *propria vigiore* and forbade the parties on whom it is served to do those things which the order of the Circuit Court dissolving the injunction permitted them to do. And though the things which were forbidden to be done by the *supersedeas* itself in this case are identical to the things which the injunction granted in this case by the County Court forbade the parties to do, yet this *supersedeas* or new order by this court operated itself directly on the parties AND IF THEY DID WHAT IT FORBADE THEM TO DO, they must answer for their contempt of this *supersedeas* order of this court which issued it." State v. Bridge Co., 16 W. Va. 864. Opinion 874.

To show further what the Supreme Court of West Virginia itself thought it decided by the above case, we again quote from a later decision of the same court cited in our former brief. In this later case the Court refers to the above case and again reaffirms the doctrine that the reason why, in such a case, the appellate court has power to punish, is because it was an order of the Supreme Court itself that was violated. In passing upon it, it said:

> "I Beach on Injunctions, Sec. 283, lays down that the lower court has jurisdiction in such a case; but as stated above (meaning the case above cited), the law being that the order of the lower court dissolves and ends the injunction, and it is only given new life BY THE SUPERSEDING WRIT OF THE APPELLATE COURT, it seems to me that the position taken in State v. Bridge Co. is right." State v. Harness, 26 S. E. 270.

In the case above decided the Court squarely held that where it was a violation of an order of the court below that that court had the sole jurisdiction to punish for contempt. The Court said:

> "But be not misled by this to conclude that this determines that in all cases contempt proceedings must be in the appellate court. The principle just stated means only that after appeal the lower court can do nothing more in the case, order nothing further within the scope of the case as relief, EXCEPT TO PRESERVE THE PROPERTY. The appeal, however, does not cover matters not embraced within the issues made by the record, though such matters may grow out of the same subject."

Counsel also cite the case of Wilkinson v. Dunkley, 141 Mich. 409, as sustaining their theory that it is the appellate court and not the lower court which must punish for a violation of an order of the lower court pending an appeal. As we said in our former brief, the few cases which apparently sustain this view are based upon the erroneous idea that an appeal from an injunctional order deprives the lower court from all jurisdiction of every kind and character pending the appeal and deprives it of any power to maintain the *status quo* of the property by contempt proceedings or otherwise. Such theory is in direct conflict with many decisions of this court, including the celebrated Slaughter House cases, reported in 10th Wallace, and cited in our former brief.

The Michigan case cited bases its decision squarely upon the proposition that the effect of the appeal was to bring the case into the Supreme Court and to stay all proceedings in the court below.

Counsel also cited Bridge Co. v. Krieger, 91 Ky. 625.

Kentucky is another state which holds that when an appeal is taken the Court below, pending the appeal, has lost all jurisdiction to enforce its injunctional orders by proceedings in contempt or otherwise, which theory, as said above, is in conflict with the decisions of this court. To show that this is true and that the Supreme Court of Kentucky based its decision upon the theory that it had jurisdiction because the lower court, by the appeal, had been deprived of jurisdiction, let us quote the following from the case cited by counsel:

> "And such violation occurring while appeal from that judgment is pending must be treated as especially in contempt and defiance of this court BECAUSE THE LOWER COURT FOR THE TIME BEING HAS NO POWER TO ENFORCE OBEDIENCE TO ITS JUDGMENT." Bridge Co. v. Krieger, 91 Ky. 625.

Counsel also cite the case of San Antonio Railway Co. v. State, decided by the Court of Civil Appeals of Texas as also sustaining the theory that it is the appellate court and not the court making the order that has jurisdiction to punish. This court also bases its judgment upon the theory that it must be the Court of Appeals that has the power to punish, because if it has not the offense would go unpunished because of the fact that the appeal wholly deprives the court below of all jurisdiction of every kind and character pending the appeal. The language of the Court is as follows:

> "The appeal from the trial court removed the cause from that court and placed it with the parties, as well as the subject-matter of the litigation, wholly within the jurisdiction of this tribunal." Railway v. State, 38 S. W. 54, Opinion 59.

Counsel also cite in support of their proposition the

case of Florida v. Johnson, 13 Fla. 33. This case, like the West Virginia case, was a case where the Supreme Court punished a party for violating a specific order of the Supreme Court itself, and not for the violation of an order of the court below. The court below appointed a receiver of a railway and directed him to take possession and manage and operate the same, pay the expenses thereof, and collect all the proceeds arising from the traffic on said road. The receiver filed his bond and qualified and proceeded to operate the road. An appeal was taken to the Supreme Court from the order appointing the receiver. Application was made to the Chief Justice of the Supreme Court for a writ of *supersedeas* commanding the court below not to enforce his judgment and commanding the receiver to cease acting as such and to turn the railroad property back to its owner. On this application and bond being filed the Chief Justice of the Supreme Court, among other things, made the following order:

> "And you, the said James W. Johnson, Receiver, are hereby commanded that you restore and surrender the Tallahassee Railroad called in said interlocutory decree and order the Pensacola & Georgia Railroad to the Tallahassee Railroad and the money received by you from the operation of the same to the Tallahassee Railroad Company or to Franklin Dibble, the president thereof, and all of the property aforesaid of said company, except so far as you have paid out the same in operating said road or roads, according to said interlocutory decree and order, and that you make such restitution, surrender and return without delay."

This order of the Chief Justice was served upon the judge of the Circuit Court and also upon the receiver and a demand was made that he comply with this order of the Supreme Court, but said Johnson refused to sur-

render, but proceeded, in violation of the command of the Supreme Court, to keep possession of and operate the railroad. Under such circumstances, the Supreme Court of Florida held that it had the power to punish the parties for contempt. Nobody questions this. It is the doctrine we are contending for. The court whose order is violated is the only court which has jurisdiction to punish for its violation. And yet the above decision is quoted by counsel as an authority sustaining the view that the appellate court has power to punish for a violation of an order made by the court appealed from.

Another case cited is the case of State v. Campbell, 25 Mo. App. 640. In this case the Court based its judgment, like the cases above referred to, upon the theory that the appeal deprived the lower court of all jurisdiction and of all power to punish for a violation of its order pending an appeal. In its opinion, in the case cited, the Court **said:**

> "When an appeal is perfected, the Court which rendered the judgment loses all jurisdiction over the cause and its parties, except only such as may be necessary for the perfecting of its own records. IT CANNOT, THEREFORE, ENFORCE ANY ORDER PREVIOUSLY MADE BY PUNISHMENT FOR CONTEMPT OR OTHERWISE."

This doctrine is not only in conflict with the decisions of this court, but is in direct conflict with the decision of the Supreme Court of Missouri. In a case cited in our former brief, being State *ex rel.* v. Dillon, 96 Mo. 56, after an appeal had been taken to the Supreme Court, the injunction granted by the court below was violated and the court below proceeded to punish for contempt. The parties against whom the proceed-

ings were begun brought an action in the Supreme Court of Missouri, praying for a writ of prohibition to issue to the court below prohibiting it from further proceeding in the contempt matter for the reason that the appeal deprived it of all jurisdiction, including the right to maintain the *status quo*. The Supreme Court refused the writ and held that the court below was the proper court to punish for such violation and wound up its opinion with the following words:

> "Whoso violates it is guilty of a contempt of the court that rendered it and may be proceeded against in an independent *quasi*-criminal proceeding by way of attachment and punished for such contempt by that court."

In our judgment the decision of the Court of Appeals of Missouri will not be given much weight in view of the fact that its decision is in direct conflict with the law of the State of Missouri as announced by the court of last resort of that State.

Counsel seem to think that because all of the cases cited by us holding that the court below has jurisdiction to proceed to punish for violation of its orders pending appeal, do not expressly say that the Court of Appeals has **not** jurisdiction that they are not applicable to the question at issue. In answer to this, we ask, Is it possible that two courts can have jurisdiction of the same offense at the same time? Is it possible that the same act can contemn two courts at the same time? If jurisdiction to punish remains in the court below and such jurisdiction pending the appeal is still in the court appealed from, when, where and how does the court appealed to get jurisdiction in such matters?

Another case cited by counsel is Penn. R. R. Co. v. National Docks R. R. Co., 54 N. J. Eq. 647. Why this

case was cited we do not know. It doesn't even touch at any place on the question under discussion in this case. It was an action between two railroad companies. One was seeking to cross the other's yards and tracks and to tunnel under the same. One railroad claimed that the other had no right to interfere with its tracks and no right to cross over the same or to tunnel under them. This was the issue joined between the parties. The Chancellor trying the case held that the road had a right to interfere with the other road by crossing over the same and by constructing a subterranean passage under its yards, and that the other road had no right to interfere with its so doing. From this judgment decreeing that the one road had a right to so cross and tunnel under the other, an appeal was taken to the court of last resort. A proper bond was given. Notwithstanding the appeal, the appellee insisted upon going on pending the appeal and carrying out the judgment of the court by constructing its tunnel and crossing the track. This the appellant would not permit. The court below cited the appellant for contempt of court in not permitting the other party to carry out its judgment pending the appeal and proceeded to punish the party for contempt; the Chancellor who tried the case held that the appeal did not suspend any portion of his judgment and that **he, and he alone,** had the sole power to suspend the operation of his affirmative judgment pending the appeal. The Court of Errors and Appeals held that when the appeal was perfected that this suspended the operation of the **affirmative portion of the judgment** below and that, therefore, the parties were not gulity of contempt in doing what the law gave them a right to do. That is to say, to simply require the parties to refrain from

carrying out the affirmative judgment of the court below pending the appeal.

By the careful consideration of the cases above reviewed, which are cited by counsel for appellant, it will be found that the only authority which even squints at sustaining the theory that an appellate court can punish for a violation of an injunctive order of the court appealed from is the Colorado case. Among all decisions on this subject it stands alone in conflict with the decisions of the courts of other states and in conflict with the decisions of this court. As this case is being argued on the motion to discharge rule, we do not care to discuss any of the other matters set out in the brief of appellant.

Respectfully submitted,

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